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ABSTRACT

This report discusses sex-based wage discrimination, the role of comparable worth doctrine in analyzing or combating such discrimination, and the appropriateness of the remedial prescriptions that comparable worth doctrine envisions. The report consists of a brief introduction and five chapters. Chapter 1 presents a brief overview of women in the work force. It describes and explains the recent growth in female employment, protective legislation, and earning ratios for men and women. Chapter 2 discusses the general situation of the wage gap, and considers theories which have attempted to account for its existence. The variety of methods used to measure discrimination are assessed, and it is concluded that employers must not be held responsible for social situations beyond their control. Chapter 3 addresses the issue of using job evaluations as the basis of wage determination. The role of market forces in determining wages is analyzed, and job evaluation procedures commonly used by firms are reviewed. The possible consequences of basing pay on job evaluations, as comparable worth advocates suggest, are evaluated. Chapter 4 analyzes legal issues surrounding the comparable worth question. Focus is placed on the Equal Pay Act and Title VII of the Civil Rights Act of 1964, which are said to be the two principal Federal statutory bases on which plaintiffs may make claims of sex-based wage discrimination. Finally, Chapter 5 presents major findings and recommendations. Federal civil rights enforcement agencies are encouraged to reject comparable worth and rely instead on the principle of equal pay for equal work. Moreover, it is recommended that the Justice Department and Congress resist comparable worth doctrine. The report concludes with concurring statements from members of the United States Commission on Civil Rights. (KH)

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Comparable Worth:

An Analysis and Recommendations

A Report of
The United States
Commission on Civil Rights
June 1985

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- Investigate complaints alleging that citizens are being deprived of their right to vote by reason of their race, color, religion, sex, age, handicap, or national origin, or by reason of fraudulent practices;
- Study and collect information concerning legal developments constituting discrimination or a denial of equal protection of the laws under the Constitution because of race, color, religion, sex, age, handicap, or national origin, or in the administration of justice;
- Appraise Federal laws and policies with respect to discrimination or denial of equal protection of the laws because of race, color, religion, sex, age, handicap, or national origin, or in the administration of justice;
- Serve as a national clearinghouse for information in respect to discrimination or denial of equal protection of the laws because of race, color, religion, sex, age, handicap, or national origin;
- Submit reports, findings, and recommendations to the President and the Congress.

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PREFACE

In June 1984 the U.S. Commission on Civil Rights held a 2-day consultation on comparable worth. Sixteen experts testified at the consultation, representing diverse points of view from the academic community, labor relations consulting firms, law firms, and advocacy groups. Eight of the witnesses generally supported implementation of the comparable worth theory, and eight generally opposed it. This report is based on the consultation and on additional study by Commission staff. The Commission adopted the report's findings and recommendations on April 11, 1985, by a vote of five to two, with one abstention.

The issues examined include the history and possible causes of the gap in earnings between women and men, possible causes of "occupational sex segregation," the use of job evaluations to compare the worth of different jobs as a means of eliminating alleged discrimination in wage setting, the judicial status of comparable worth, and the philosophical, economic, and social ramifications of mandating use of the comparable worth theory. The Commission's findings and recommendations follow the analysis of these issues. They, in turn, are followed by the concurring statements of Chairman Clarence M. Pendleton, Vice Chairman Morris B. Abram, and Commissioner Robert A. Destro, and by the dissenting statement of Commissioners Mary Frances Berry and Blandina Cardenas Ramirez.

References to papers in the report refer, unless otherwise specified, to the papers submitted to the Commission by the experts invited to testify at the consultation. These papers appear in volume one of the Commission publication, *Comparable Worth: Issue for the 80's.* References in the report to testimony may be found in volume two.

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The Commission is indebted to the following current and former staff members who participated in the preparation of this report:

Overall supervisory responsibility for the report rested with Linda Chavez, who served as the Commission's Staff Director at the time this report was approved by the Commission.

Preparation of the substantive content of the initial draft of the report was the responsibility of Mark R. Disler, former General Counsel; Joel C. Mandelman, Acting General Counsel; William J. Howard, Special Assistant to the General Counsel; and Malcolm Sherman, Ph.D., Assistant to the Staff Director. Preparation of the substantive content was conducted under the general supervision of Mark Disler until his departure from the Commission, at which time Max Green, Assistant Staff Director for Programs and Policy, and June O'Neill, Ph.D., director of the Commission's project on trends in incomes of Americans, assumed editorial responsibility for the report.

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Introduction

There is, undeniably, a gap between the average earnings of women and the average earnings of men in the American economy.

A number of observers believe that this gap results in whole or in part from sex discrimination in the setting of wages. By now, the issue is not chiefly the straightforward one of unequal pay for equal work, which is illegal under the Equal Pay Act of 1963 (EPA).[1] Instances of its violation still arise, and it still calls for uncompromising enforcement, but attention today has turned to something different.

Some believe that when employees in a job held predominantly by women are paid less than employees in a different job held predominantly by men, and the jobs, though different, are of equal or comparable worth to the employer according to some measuring process, this pay disparity is usually the result of, or is itself, discrimination on the basis of sex. The pay rates, in this view, must be equalized, and in practical terms this means that the pay in the predominantly female job must be raised to the level of pay in the predominantly male job. Others argue that no one can determine to a legal certainty whether two different jobs are of equal or comparable worth to an employer and that factors such as market supply and demand, seniority and merit systems, and collective bargaining can explain many such pay disparities between different jobs.

This issue, generally described as "comparable worth," is the subject of this report. The report discusses sex-based wage discrimination, the role of comparable worth doctrine in analyzing or combatting such discrimination, and the appropriateness of the remedial prescriptions that comparable worth doctrine envisions. This report focuses on sex-based wage discrimination between two different jobs, falling outside of the EPA context, and on the appropriateness of the comparable worth concept as a tool to analyze sex-based wage discrimination and as a remedial device.

Comparable worth has been defined variously. A number of the definitions are similar to each other. The Supreme Court has referred to it as "the controversial concept of 'comparable worth' under which plaintiffs might claim increased compensation on the basis of a comparison of the intrinsic worth or difficulty of [a] job with that of other jobs in the same organization or community."[2] Commentators and other courts, however, have employed different definitions. Comparable worth has been described as "compel[ling] equal compensation for unequal (dissimilar) work of equal value to an employer and. . .compel[ling] compensation for unequal work of unequal value at rates proportionate to value."[3] It has also been defined as "the concept of equal pay for work that involves responsibilities of commensurate value to the employer."[4] Another expert has stated, comparable worth "requires. . .that dissimilar jobs of equivalent worth *to the employer* should be paid the same wages."[5]

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[1] 29 U.S.C. §206d (1982).

[2] County of Washington v. Gunther, 452 U.S. 161, 166 (1981) *(dicta)* (footnotes omitted).

[3] Cox, *Equal Work, Comparable Worth and Disparate Treatment: An Argument for Narrowly Construing County of Washington v. Gunther*, 22 Duq. L. Rev. 65, 85 (1983).

[4] Gasaway, *Comparable Worth: A Post-Gunther Overview*, 69 Geo. L.J. 1123, 1123 n.6 (1981).

A Federal court explained its view that the element common to all comparable worth definitions is:

> that discrimination exists when workers of one sex in one job category are paid less than workers of the other sex in another job category and both categories are performing work that is not the same in content, but is of the "comparable worth" to the employer in terms of value and necessity.[6]

Other notions would require courts to infer wage discrimination sufficient to establish a prima facie case solely on the basis of evidence that a job is sex segregated and held primarily by females who are paid a low wage.[7]

Under many formulations of comparable worth doctrine, a wage disparity between purportedly comparable, but different jobs by itself constitutes the violation of law. The employer is not even permitted to escape liability by presenting legitimate, nondiscriminatory reasons for the unequal wages.

For the purpose of this report, comparable worth refers to the general formulation that employees in jobs held predominantly by females should be paid the same as jobs of comparable worth to the employer held predominantly by males. The report also examines instances where evidence of comparability between different jobs may serve as some evidence of a violation of Title VII of the Civil Rights Act of 1964.

Some have used the term pay equity as a synonym or substitute for comparable worth.[8] This is a mischaracterization of the issue. Pay equity is a goal that most people support. As a chapter in this report discusses, however, pay equity is very much in the eye of the beholder. In spite of a centuries-long search for a "fair" or "just" wage, no absolute measure of fair pay exists. Comparable worth is better described as *one means* of achieving the goal of pay equity. (Other means, in the eyes of others, might be the functioning of the "marketplace" or "supply and demand.") By equating pay equity—and its inevitable connotations of fairness—with comparable worth, which is now controversial, some advocates have sought to obtain a subtle rhetorical advantage. But comparable worth must be considered on its own merits, not confused with a politically satisfactory label that may mask the principles underlying comparable worth and the mechanics of its implementation.

The report first discusses the history of women in the American workplace and then considers the pay gap between women and men and various explanations for its existence. Next, it examines the role of job evaluation studies in the setting of wages and legal perspectives on the issue. A final chapter sets forth the Commission's findings and recommendations.

It is necessary, in examining this issue, to consider possible explanations for the pay gap that do not involve discrimination and to review the ways in which pay is set in the American economy, including the role of job evaluations and market factors of labor supply and demand. First, the accuracy must be determined of two underlying premises of comparable worth: (1) that the pay gap largely reflects discrimination against women and (2) that pay disparities between different, but purportedly comparable, jobs reflect discrimination. These premises, obviously, bear significantly on the appropriateness and utility of comparable worth as an antidiscrimination remedy. An examination of these alternative explanations for the pay gap and different pay for different jobs is clearly necessary in assessing the role of comparable worth in anti-sex discrimination law.

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[5] Ronnie J. Steinberg, "Identifying Wage Discrimination and Implementing Pay Equity Adjustments" (hereafter cited as Steinberg paper), in *Comparable Worth: Issue for the 80's* (a consultation of the U.S. Commission on Civil Rights, June 1984, Washington, D.C. (hereafter cited as Consultation)), vol. 1, p. 99 (emphasis in original). In her formulation, Ms. Steinberg includes jobs performed primarily by minorities as well as jobs performed primarily by women. See ibid.

[6] Power v. Barry County, Mich., 539 F. Supp. 721, 722 (W.D. Mich. 1982). *See also* Connecticut State Employees Ass'n v. State of Connecticut, 31 Empl. Prac. Dec. (CCH) 33,528 (D. Conn. 1983).

[7] Professor Ruth G. Blumrosen is the best known proponent of this theory. *See* Blumrosen, *Wage Discrimination, Job Segregation, and Title VII of the Civil Rights Act of 1964*, 12 U. Mich. J.L. Ref. 397, 459 (1979). For opposing views *see* Nelson, Opton & Wilson, *Wage Discrimination and the "Comparable Worth" Theory in Perspective*, 13 U. Mich. J.L. Ref. 231 (1980). It appears that no Federal court has adopted this theory or, indeed, any theory of comparable worth standing alone in finding a violation of antidiscrimination laws protecting persons on the basis of gender. *See, e.g.*, Briggs v. City of Madison, 536 F. Supp. 435 (W.D. Wis. 1982).

[8] Steinberg paper, p. 99; Joy Ann Grune, "Pay Equity Is a Necessary Remedy for Wage Discrimination," Consultation, vol. 1, p. 165; Nina Rothchild, "Overview of Pay Initiatives, 1974–1984," Consultation, vol. 1, p. 119.

This report draws upon a 2-day consultation held by the Commission June 6–7, 1984, in Washington, D.C.

Chapter 1

Brief Overview of Women in the Work Force

Growth in Female Employment

In the colonial America of sparse, agricultural settlements, women worked mostly in the home, producing necessities that ranged from clothing to soap and candles, in addition to cooking, cleaning house, and raising children. There are accounts of 18th century women who worked as tavern keepers, store proprietors, and publishers, as well as domestic servants and seamstresses,[1] but they were few in number. In 1800, for example, only 5 percent of white women over the age of 10 are estimated to have worked outside the home.[2]

Gradually, from 1800 to 1850, the figure increased to 10 percent of white women. It decreased slightly during the 1850s, but began to rise again during the Civil War. By 1870, at which time it becomes meaningful to look at figures for *all* women (white and nonwhite), 14 percent of those over the age of 14 were employed. The figure stood at 24 percent by 1930.[3]

The Great Depression, of course, brought tremendous general unemployment. However, the proportion of employed women held firm, rising to 25 percent by 1940. Largely as a result of greatly increased production needs and acute labor shortages, the war years saw further employment increases among women aged 16 and older, from 28 percent in 1940 to 36 percent in 1945. This figure decreased slightly to 34 percent by 1950, but rebounded to 38 percent by 1960. In 1970, 43 percent of women worked outside the home; in 1980, 52 percent.[4] If teenagers (many of whom are still in school) and women over 65 (many of whom have retired) are excluded, the 1982 figure was 63 percent.[5] Absolute numbers tell an even more dramatic story: In 1950, 18.4 million women were in the work force; in 1980, 44.7 million.[6]

Although employment for all subgroups of women also increased steadily, there were significant differences by race, social class, and marital status. In 1900, 21 percent of women aged 16 and over were employed. But for married white women that figure was only 3 percent, while for single white women it was 41.5 percent. For single nonwhite women, the percentage employed was 60.5; for married nonwhite women, 26. Overall, the figure was 43 percent for nonwhite women, compared to 18 percent for white women.[7]

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[1] Edith Abbott, *Women in Industry* (New York: Arno Press, 1969), pp. 13–19.

[2] W. Elliot Brownlee and Mary M. Brownlee, *Women in the American Economy* (New Haven & London: Yale Univ. Press, 1976), p. 3.

[3] Ibid., p. 3.

[4] June O'Neill and Rachel Braun, *Women and the Labor Market: A Survey of Issues and Policies in the United States* (Washington, D.C.: The Urban Institute, 1981), p. 3 (hereafter cited as O'Neill-Braun).

[5] Calculated from U.S. Department of Labor, *Handbook of Labor Statistics*, Bulletin 2175 (December 1983) (hereafter cited as Handbook of Labor Statistics).

[6] O'Neill-Braun, p. 3.

Census data for 1900 were not collected by income level, but it is reasonable to think that these differences by race were at least partly a reflection of differences in income. Cultural or ethnic differences, though, also seem to have played a role. Thus, foreign-born women in 1890 had very low rates of participation when married (3 percent as against 2.5 percent for white married women), but had the highest rates of participation when single (71 percent, as against 59.5 percent for single nonwhite women and 40.5 percent for single white women). The same pattern held in 1930.[8]

By far the largest increases occurred among married white women, whose rate of participation increased from 3 percent in 1900, to 10 percent in 1930, to 30 percent in 1960, to 49 percent in 1980.[9] What was once uncommon has now become the norm: In 1982, 49 percent of married women with children under 6 were in the labor force, and 63 percent of women whose children were 6 to 17 were working.[10]

Among never-married women, the percentage working increased moderately, from 49 in 1940 to 61.5 in 1980. Among married women living with their husbands, the proportion working more than tripled, going from 15 percent in 1940 to 50 percent in 1980.[11] Because of the dramatic increases among married women, marriage can no longer be considered the single decisive factor in determining whether or not a woman works outside the home.

Other factors being equal, better educated women are more likely to work, but women's participation in the work force tends to fall as the income of husbands increases. In 1978, 57 percent of women whose husbands earned between $10,000 and $12,000 were working outside the home, but only 40 percent of women worked when their husbands earned between $25,000 and $35,000. This figure was 27 percent when husbands earned over $50,000. Among wives whose husbands earned between $20,000 and $25,000, the proportion working was 36 percent among wives with less than 12 years of schooling, 45 percent for wives with 12 years of schooling, and 49.5 percent for wives with 16 years of schooling.[12]

The general trends tend to obscure even sharper changes within age cohorts. Among successive cohorts of married white women, beginning with those born between 1886 and 1895, and continuing to the group born between 1926 and 1935, the proportions in the labor force at age 50 were successively 10 percent, 22 percent, 38 percent, 45 percent, and 51 percent. The 1936 to 1945 cohort has not yet reached age 50, but work force participation was more than 55 percent even at age 40, and every previous cohort has shown an increase in participation from age 40 to age 50. At age 30, the 1946 to 1955 cohort has already reached a participation rate of virtually 55 percent.[13] Almost 70 percent of women born from 1956 to 1964 were in the labor market while in their early twenties, a far higher proportion than that of any previous cohort at this age.[14]

In addition to entering the job market in unprecedented numbers, women in recent years have also been less likely to leave the work force. Although departure rates for women are still much higher than for men, differences are narrowing. Among all women over 16, the exit rate was 20.5 percent per year in 1970, 16.8 in 1975, and 14.2 in 1980. For men, the rate was 6.7 percent in 1970 and 6.1 percent in 1980. Among workers aged 25 to 59, women were nine times as likely as men to leave the work force in 1970, but only four times as likely in 1980.[15]

Causes of Recent Growth

What accounts for the dramatic rise in the labor force participation of women, especially since 1950? There seems to be reasonable agreement, at least among economists, on some relevant factors. Especially important for married women have been technological inventions that have reduced the need for labor in the home beginning with refrigerators, gas and electric stoves, and washing machines, and now encompassing other time-saving devices such as dishwashers, self-cleaning ovens, wash-and-wear fabrics, home freezers, and microwave ovens. Also relevant have been the increased availability of outside services, including one-stop food shopping at supermarkets, comprehensive shopping centers, and the growth of the fast food industry. (There is, of course, a chicken and egg problem here: perhaps labor-saving devices found markets because more women were working outside the home, leaving less time to devote to the household. But few full-time homemakers denied themselves the convenience of washing machines and dishwashers if they could afford them.) In addition, new methods of birth control improved women's ability to plan the number and timing of pregnancies; decreases in infant and child mortality reduced the number of pregnancies necessary to achieve families of a given size. The decline in fertility was both caused by and was itself a factor encouraging women to seek employment or to continue in the labor force. Increasing divorce rates made it prudent for women to have job skills to fall back on, and those women who were divorced were likely to depend on their own earnings.[16]

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[7] Claudia Goldin, "The Earnings Gap in Historical Perspective" (hereafter cited as Goldin paper), in *Comparable Worth: Issue for the 80's* (a consultation of the U.S. Commission on Civil Rights, June 1984, Washington, D.C.) (hereafter cited as Consultation), vol. 1, p. 5.

[8] Ibid.

[9] Ibid., p. 5 (table 1).

[10] Handbook of Labor Statistics, table 54.

[11] O'Neill-Braun, p. 4.

[12] Ibid., p. 10.

[13] Goldin paper, p. 9, figure 1.

[14] O'Neill-Braun, p. 12.

[15] Ibid., p. 44.

There are also a number of general factors. Increased productivity and economic growth raised earnings for women as well as for men and, thus, made work outside the home an increasingly attractive alternative to work within the home (even though wives tend to work less as their husbands' earnings increase). Growth in the service industries provided more flexible working hours, opportunities for part-time work, and job locations near home,[17] all of which may have been attractive to married women.

Delayed first marriages and increases in the proportion of women who do not marry at all have also been associated with increased female participation in the labor market, especially for younger women. The number of marriages per 1,000 unmarried women aged 15 to 44 dropped from 147 in 1968 to 108 in 1979. Among women aged 25 to 29, the proportion who had never married rose from 10.5 percent in 1970 to 20.8 percent in 1980.[18]

The growth in school (especially college) attendance among women has increased both job aspirations and the likelihood of remaining in the job market. During the 1930s and 1940s, women were somewhat more likely than men to complete high school and were somewhat less likely to attend college. Thus in 1947, among 25- to 29-year-olds, the proportion of white males who had graduated from high school was 53 percent, while for white females it was 57 percent. In 1979 the figures for the same age group were 87.7 percent for white males, 86.4 percent for white females.[19] During the 1950s, partly because the G.I. Bill encouraged veterans of World War II and the Korean war to attend college, men's college attendance increased more rapidly than women's. In recent years, however, women's college attendance has increased more rapidly than men's. The proportion of 25- to 29-year-olds who had at least 1 year of college was 52 percent among white males and 44 percent among white females in 1979. (Among nonwhites the male proportion was 36 percent, while the female proportion was 35 percent.)[20] Of those attending college in 1978, 49.9 percent were women, though women were a somewhat smaller proportion (47.1 percent) of full-time students. In 1978 women made up 50.2 percent of undergraduates, 25 percent of those working toward a first professional degree, and 46 percent of graduate students.[21] In 1981 a majority of all master's degrees (50.3 percent) were awarded to women, who received 48.2 percent of all degrees awarded that year.[22]

From 1970 to 1981, the annual percentage of law degrees conferred upon women went from 5.4 to 32.4. In absolute numbers, almost 15 times as many law degrees were awarded to women in 1981 as in 1970. For medical degrees, the percentage increased from 8.4 in 1970 to 24.7 in 1971 (5.5 times as many women in absolute numbers).[23]

The effect of social attitudes upon female employment is difficult to gauge. As more and more women have entered the job market and predominantly male occupations, women have become accepted or more accepted, but it is hard to separate cause and effect. Economists tend to stress technological factors and to see attitudes more as reflections than as causes of change. However, social attitudes, until recently at least, probably retarded the growth of female employment.

In 1928, 51 percent of school systems required single women to resign upon marriage, and this proportion increased to 61 percent during the depression years of the 1930s, when working women were viewed by some as depriving men with families of jobs.[24] Factories that employed both men and women sometimes segregated jobs, paying higher salaries for male jobs. For example, Westinghouse, in 1939 at its Trenton, New Jersey, plant, employed women only on assembly line jobs, subassembly line jobs, and quality control jobs, which paid less than the male jobs of janitor, forklift operator, and warehouseman. A 1939 company manual openly stated that wage rates for female jobs were set lower than those for male jobs that had received the same point rating by the company.[25]

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[16] Ibid., pp. 2–7.

[17] Ibid., p. 58.

[18] Ibid., p. 14.

[19] Ibid., p. 16.

[20] Ibid., p. 85.

[21] Ibid., p. 87.

[22] U.S. Department of Commerce, Bureau of the Census, *Statistical Abstract of the United States*, 104th ed. (1984), p. 169.

[23] Ibid., p. 170.

Another example is Wheaton Glass, which had traditionally hired only males as "selector-packers." In 1956 Wheaton created a new category of selector-packer into which females were hired at a lower pay rate. When the practice was successfully challenged in 1968 as a violation of the Equal Pay Act of 1963, women selector-packers were being paid $2.14 per hour, while men received $2.36 per hour. Women, unlike men, were not required to lift more than 35 pounds, but other male workers, whose job consisted only of this lifting ("snap-up boys") were paid $2.16 per hour.[26]

After passage of the Equal Pay Act of 1963, some companies and unions tried to preserve salary differentials by adding trivial new assignments to male jobs that would appear to justify the perpetuation of wage differences.[27] Miller Brewing Company, which was found to have violated the Equal Pay Act in a 1972 case, had sometimes used lower paid women to train higher paid men.[28] It would be difficult to estimate or document the extent of these and similar practices, but it seems clear that discrimination was not uncommon.

On the other hand, although many individual women may have been victims of discrimination, overall employment statistics do not suggest, as has sometimes been claimed, that during certain periods large numbers of women were fired in order to give their jobs to men. The proportion of women employed increased slightly (from 24 percent to 25 percent) during the 1930s, even though women were often forced to resign teaching jobs upon marriage. Women's employment did decline after World War II, from a wartime peak of 19.3 million in 1945 to 16.8 million in 1946. However, these 2.5 million women were not replaced by men, since total male employment also *decreased* from 1945 to 1946 (3.2 million fewer men were employed in 1946 than in 1945). The proportion of women employed declined from 36 percent in 1945 to 34 percent in 1950, but declines were observed only among younger women, who may have left the work force voluntarily to marry or to have children. Among women aged 45 to 64, the number employed increased by 18 percent, from 4.4 million in 1945 to 5.2 million in 1950.[29]

Protective Legislation

Ambivalent attitudes toward the role of women are reflected by turn of the century reform efforts during the "Progressive Era" in America. Most reformers sincerely sought to improve unsafe working conditions, to reduce long hours, and to raise low pay. Partly because of judicial rulings declaring such regulatory legislation unconstitutional, however, these efforts often took the form of more restricted "protective legislation" to regulate the terms and conditions of labor *only* for women and children. Minimum wage and maximum hour laws (applying only to women, not men), and laws barring women from jobs requiring continuous standing or heavy lifting, were enacted in many States, and the effect was sometimes to limit women's employment opportunities.

Other laws or rulings placed restrictions on women that were not "protective," but openly exclusionary. In 1869, for example, the Illinois Bar refused to admit a woman, though it was soon forced to do so by action of the Illinois Legislature. Exclusionary actions continued well into this century. In the 1940s several States passed laws prohibiting women from tending bar unless they were the wives or daughters of bar owners. (A Michigan law to this effect was upheld by the Supreme Court in *Goesaert* v. *Cleary*).[30]

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[24] Valerie I. Oppenheimer, *The Female Labor Force in the United States* (Berkeley: Population Monograph Series, No. 5, 1970), cited by O'Neill-Braun, p. 7.

[25] The manual was cited in evidence in a recent case, IUE v. Westinghouse Elec. Corp., 631 F.2d 1094 (3d Cir. 1980), *cert. denied*, 452 U.S. 967 (1981).

[26] Shultz v. Wheaton Glass, 421 F.2d 259 (3d Cir. 1970), *cert. denied*, 398 U.S. 905 (1970).

[27] *See, e.g.*, Shultz v. Saxonburg Ceramics, 314 F. Supp. 1139 (W.D. Pa. 1970).

[28] Hodgson v. Miller Brewing Co., 457 F.2d 221 (7th Cir. 1972).

[29] U.S. Department of Commerce, Bureau of the Census, *Historical Statistics of the U.S.: Colonial Times to 1970*, Series D 29–41, p. 131.

In a 1905 decision, *Lochner* v. *New York*,[31] the Supreme Court declared unconstitutional a New York law that barred employees (male or female) of bakeries from working more than 60 hours per week. The majority held that restricting hours was an unconstitutional interference with the workers' "liberty of contract," a right that was, in turn, derived from the due process clause of the 14th amendment.

Only 3 years later, in *Muller* v. *Oregon*,[32] the Supreme Court unanimously upheld Oregon legislation that limited females to 10-hour workdays. It distinguished this case from *Lochner* on the grounds that "woman's physical structure, and the functions she performs in consequence thereof, justify special legislation restricting or qualifying the conditions under which she should be permitted to toil."[33] The decision was heavily influenced by the famous "Brandeis brief," in which Louis D. Brandeis, who was later to serve on the Supreme Court, presented (as described by the Court):

> extracts from over ninety reports of committees, bureaus of statistics, commissioners of hygiene, inspectors of factories, both in this country and in Europe, to the effect that long hours of labor are dangerous for women, primarily because of their special physical organization. . .maternal functions, the rearing and education of the children, [and] the maintenance of the home. . . .[34]

In the light of *Lochner* and *Muller*, it was rational for reformers to press for legislation for women only, and by 1908, 19 States had passed laws setting maximum hours for women or prohibiting night work.

Three years after *Muller*, over 140 women and girls who were locked in on the 9th, 10th, and 11th floors of the Triangle Shirtwaist Company in New York City were killed in a fire. This tragedy acted as a spur to safety legislation, which, in the light of *Muller*, often took the form of protection for women and children workers. By 1920 most States had enacted such laws.[35]

In 1917, in *Bunting* v. *Oregon*,[36] a divided Supreme Court seemed to overrule *Lochner* by sustaining an Oregon law limiting (with some exceptions) the workday in mills, factories, and manufacturing establishments. In 1923, however, "freedom of contract" surfaced again as a divided Supreme Court, in *Adkins* v. *Childrens' Hospital*,[37] nullified an act of Congress that fixed minimum wages for women and children in the District of Columbia, citing *Lochner* in support of its decision.

The *Adkins* majority cited the harmful effect to one woman who lost her job when salaries were raised according to the standards of the law. The Court argued that the law:

> ignores the necessities of the employer by compelling him to pay not less than a certain sum, not only whether the employee is capable of earning it, but irrespective of the ability of his business to sustain the burden, generously leaving him, of course, the privilege of abandoning his business as an alternative for going on at a loss. . . .In principle, there can be no difference between the case of selling labor and. . .selling goods. . . .[38]

Most of the opinion is concerned with distinguishing the regulation of wages from the regulation of hours, which was upheld in *Muller*. The immediate result was to nullify a law that placed women's wages in a protected category.

Protective laws seemed secure when a divided Supreme Court in 1937 finally narrowed the scope of liberty of contract in *West Coast Hotel* v. *Parrish*.[39] The Court sustained a State of Washington law that established minimum wages only for women. Previous decisions had sustained regulations of hours of work of women employees in factories,[40] in hotels,[41] and in hospitals.[42] But the *West Coast Hotel* majority observed "that the Fourteenth Amendment did not interfere with state power by creating a 'fictitious equality' "[43] between men and women. The majority language would seem to sanction other legislation "protecting" women as well as workers in general.

Virtually all organized women's groups supported the earliest forms of "protective" legislation. Among the groups actively promoting such laws were the National Women's Trade Union League, the General Federation of Women's Trade Union League, the General Federation of Women's Clubs, and the National Consumers' League (a group organized to improve the working conditions of women by consumer pressure upon employers).[44]

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[30] 335 U.S. 464 (1948).

[31] 198 U.S. 45 (1905).

[32] 208 U.S. 415 (1908).

[33] *Id.* at 420.

[34] *Id.* at 419–20 n.1.

[35] Barbara L. Schlei and Paul Grossman, *Employment Discrimination Law* (Washington, D.C.: Bureau of National Affairs, 2d ed., 1983), p. 293 (hereafter cited as Schlei and Grossman).

[36] 243 U.S. 426 (1917).

[37] 261 U.S. 525 (1923).

[38] *Id.* at 557–58.

[39] 300 U.S. 379 (1937).

[40] Riley v. Massachusetts, 232 U.S. 671 (1914).

[41] Miller v. Wilson, 236 U.S. 373 (1915).

[42] Bosley v. McLaughlin, 236 U.S. 385 (1915).

[43] 300 U.S. 379, 395 (1937), citing Quong Wing v. Kirkendall, 223 U.S. 59 (1912).

After the 19th amendment gave women the right to vote in 1920, the feminist movement split into two wings. The equalitarian faction, mainly associated with the National Women's Party, sought the passage of an equal rights amendment and opposed all legislation that called for different treatment of women, whether to "protect" women or to restrict them. A much larger group of social feminists continued to support protective legislation (and to oppose an equal rights amendment).[45] Among major women's organizations, only the Business and Professional Women's Federation supported an equal rights amendment (and therefore opposed protective legislation) in the 1930s, while the General Federation of Women's Clubs, the American Association of University Women, the Women's Trade Union Leagues, and the League of Women Voters then opposed an equal rights amendment and supported protective legislation.[46]

By the 1960s, these views had changed, as had those of national legislators. The Equal Pay Act of 1963, which requires equal pay for men and women doing the same work, Title VII of the Civil Rights Act of 1964, which bans sex discrimination (as well as racial and religious discrimination) in employment, and the equal protection clause of the 14th amendment have been used, especially since 1970, to nullify most if not all employment practices, whether "protective" or restrictive, that treat men and women differently. As an illustration of how attitudes have changed, consider the 1965, 1969, and 1972 Guidelines on Sex Discrimination of the Equal Employment Opportunity Commission (which enforces Title VII).

The 1965 guidelines state:

> the Commission does not believe that Congress intended to disturb such laws and regulations which are intended to, and have the effect of, protecting women against exploitation and hazard. Accordingly, the Commission will consider limitations or prohibitions imposed by such State laws or regulations as a basis for application of the bona fide occupational qualification exception. However, in cases where the clear effect of a law in current circumstances is not to protect women but to subject them to discrimination, the law will not be considered a justification for discrimination. So, for example, restrictions on lifting weights will not be deemed in conflict with Title VII except where the limit is set at an unreasonably low level which would not endanger women.

The 1969 guidelines, however, assert that:

> the Commission believes that [restrictive]. . .State laws and regulations, though originally promulgated for the purpose of protecting females, have ceased to be relevant to our technology or to the expanding role of the female worker in our economy. The Commission has found that such laws and regulations do not take into account the capacities, preferences, and abilities of individual females and tend to discriminate rather than protect. Accordingly, the Commission has concluded that such laws and regulations. . .will not be considered as a defense to an otherwise established unlawful employment practice or as a basis for the application of the bona fide occupational exception.

The 1972 guidelines repeat the above statement on "restrictive" State laws and require that "beneficial" laws be extended to men:

> A number of States require that minimum wage and premium pay for overtime be provided for female employees. An employer will be deemed to have engaged in an unlawful employment practice if:
>
> (1) it refuses to hire. . .female applicants. . .to avoid the payment of minimum wages or overtime pay. . .
>
> (2) it does not provide the same benefits for male employees.
>
> As to other kinds of sex-oriented State employment laws, such as those requiring special rest and meal periods or physical facilities for women, provision of these benefits to one sex only will be a violation of Title VII.

The courts, however, have frequently not followed EEOC guidelines, and instead of extending benefits to men, they have invalidated special provisions for women. According to one text on employment discrimination law, "the only major unanswered question with respect to state protective laws [is] extension or invalidation."[47]

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[44] Barbara A. Babcock, Ann E. Freedman, Eleanor Holmes Norton, and Susan C. Ross, *Sex Discrimination and the Law* (Boston: Little Brown & Co., 1975), pp. 26–28.

[45] Susan D. Becker, *The Origins of the Equal Rights Amendment* (Westport, Conn.: Greenwood Press, 1981), p. 19.

[46] Ibid., pp. 26–27.

[47] Schlei and Grossman, p. 365.

Earnings Ratios

The "wage gap," the difference between the average earnings of men and the average earnings of women, is at the core of contemporary controversies.[48] Nationwide statistics on earnings have been available only since 1940, but it is possible to estimate ratios of women's to men's wages in particular industries or occupations for earlier periods. It has been estimated that in 1815, the ratio of women's to men's earnings in agriculture was only 0.288; i.e., female farm workers earned a little over one-quarter of what men did. In New England and the Middle Atlantic States, the ratio of women's to men's earnings in manufacturing is estimated to have risen from under 30 percent to 45–50 percent between 1810 and 1850.[49]

An 1897 U.S. Commissioner of Labor report compared the 1895–96 earnings of men and women in the same age group who worked on the same job in the same factory and were paid, on the basis of total output, at the same piece rate. Men earned on the average 30 percent more than women, which is to say that women produced only 77 percent as much as men. For time-rate work in factories, the ratio of women's to men's wages was only 60 percent in 1895.[50]

Although data are sparse, an economic historian, Claudia Goldin, estimates the ratio of women's to men's wages in 1890 at 0.46, and she also finds considerable variation in this ratio by occupation.[51] By 1930 the overall ratio is estimated to have increased to 55 percent. Relative wages in occupational categories also seem to have shifted appreciably. For example, in clerical and sales work, the ratio increased from 0.49 in 1890 to 0.71 in 1930.[52]

Earnings ratios can be computed in various ways. One way is to compare the gross earnings of all persons who work for any portion of a year, making no adjustment for differences in the number of hours or weeks worked. On this basis, the ratio of women's to men's wages was 47 percent both in 1970 and in 1980.[53] A more frequently cited comparison is based on the annual earnings of persons who worked for 50 to 52 weeks and who worked full time (at least 35 hours per week) for most (not necessarily all) of the year. This index was, according to one study, 60.5 percent in 1980 and 64.3 percent in 1983.[54] This ratio is higher because more women than men work part time or for part of the year. (The oft-quoted claim that women earn only 59 cents for every dollar earned by men is based on the value of this statistic for 1977.)

Still another ratio is based on the usual weekly earnings of persons employed full time on their current job. The ratio was 0.62 both in 1971 and in 1979, and rose to 0.66 in 1983.[55] (It is higher than the previous index because men working mostly full time are less likely than women to work only part time for a *portion* of the year.) Finally, and presumably most relevant to questions of sex discrimination, are comparisons based on hourly earnings of full-time workers. Men employed full time work almost 10 percent more hours per week than do full-time women.[56] The ratio of full-time women's to men's hourly earnings is estimated to have been 0.68 both in 1971 and in 1979 and to have risen to 0.72 in 1983.[57]

Because of its greater relevance to questions of discrimination, earnings ratios based on hourly comparisons are used in subsequent chapters where data are available. The same pattern of change appears to emerge from any of these earnings ratios, provided that the chosen ratio is used consistently. For purposes of comparison with other sources, it should be remembered that, depending on what is calculated, the sex earnings ratio for the single year 1980 ranges from 0.47 to almost 0.70.

The ratio of women's to men's earnings seems to have risen slowly from the late 19th century until about 1950, at which point it began a decline that lasted until the middle 1970s. Since then there has been an upward trend, which has accelerated since

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[48] See chap. 2.

[49] Goldin paper, figure 2, p. 10.

[50] Ibid., p. 16.

[51] Ibid., p. 10 and table 3, p. 11.

[52] Ibid., p. 11.

[53] Solomon W. Polachek, "Women in the Economy: Perspectives on Gender Inequality," Consultation, vol. 1, p. 36 (hereafter cited as Polachek paper).

[54] James P. Smith and Michael P. Ward, *Women's Wages and Work in the Twentieth Century* (Santa Monica: Rand Corp., 1984), p. 23, citing U.S. Department of Labor, Bureau of Labor Statistics, *Current Population Reports*, Consumer Income Series P-60.

[55] June O'Neill, "An Argument Against Comparable Worth," Consultation, vol. 1, p. 180 (hereafter cited as O'Neill paper).

[56] In 1975–76 married women employed full-time spent an average of 35.7 hours per week on the job, 2.9 hours in travel, and 24.6 hours working in the home (on indoor and outdoor housework, child care, and shopping). Married men spent 44.0 hours at work, 3.9 hours in travel, and 12.7 hours per week on home work. O'Neill-Braun, p. 24.

[57] O'Neill paper p. 180.

1980. In 1983 the ratio reached the 1955 level. Earnings ratios (based on annual earnings of mostly full-time workers) at 4-year intervals beginning in 1956 are 63.9, 60.8 (1960), 59.6 (1964), 58.2 (1968), 57.9 (1972), 60.2 (1976), 60.2 (1980), and 63.6 percent in 1983.[58]

Why did earnings ratios, which rose until 1950, fall for the next 20 years? Ironically, the main reason seems to be the dramatic growth in the number and proportion of working women: The entry of millions of less experienced women caused a decrease in the overall skill and experience level of all working women, thus depressing average earnings. This pattern has recently reversed itself, and the average skill and experience levels of women are now rising. As a group, though, women still have less experience than men. (For example, among female workers in 1978, the median tenure with a current employer was 2.6 years, while for males it was 4.5 years. Among workers age 45 to 54, the figures were 5.9 years for women and 11.0 years for men.)[59]

Also relevant to the decline in the sex earnings ratio from the 1950s to the 1970s, and the subsequent rise since 1980, is education. In 1952 employed women had on average completed 1.6 *more* years of school than employed men. During the 1950s, because of the educational benefits provided to veterans of World War II and the Korean war, college attendance increased more rapidly for men than for women. The millions of women who entered the work force after 1950 were, on the whole, less educated than the women who were already working. As a result, by 1979 there was no longer a sex difference in years of schooling. According to one estimate, the decline in relative levels of education should by itself have widened the pay gap by seven points, which was more than the observed increase. More recently, however, female college enrollment has increased greatly, while male enrollment fell between 1970 and 1980.[60] This combination has contributed to the recent increases in the ratio of women's to men's earnings.

The importance of occupation in explaining overall differences in men's and women's earnings is somewhat controversial. To a certain extent, women earn less than men because typically male occupations (e.g., law, engineering, and plumbing) pay better than typically female occupations (e.g., nursing, office work, and teaching). Efforts have been made to determine how much of the total wage gap comes from these sex differences in occupations. The results are sensitive to the definition of an "occupation," and various studies have produced different numbers. Few studies, however, attribute even as much as half of the wage gap to occupational segregation.[61] Although some authors see sex differences in occupational patterns as evidence of constraints on women imposed by societal norms, others explain these differences essentially as consequences of the uncoerced choices of women who seek to balance work and family responsibilities.

Occupational concentration is usually measured by an "index of segregation." (This terminology should not be interpreted as a statement about the causes of occupational patterns.) This number is the proportion of men *or* women who would have to change jobs in order for men and women to be in the same proportion in every job category that they are in the economy as a whole. A value of 100 percent would mean total segregation, while 0 percent would mean proportional representation in every occupation. The values for this index also depend somewhat on how occupations are defined, but the pattern of changes in the index does not depend on which breakdown is used.

For most of the 20th century and probably throughout the 19th century, the value of the index was over 67 percent, which indicates a substantial degree of occupational separation by sex. Lately, this index has begun to decline, from 68 percent in 1972 to 62 percent in 1981.[62] The decrease in occupational segregation reflects increasing numbers of women in traditionally male professions, rather than an increase in the number of men in traditionally female jobs. Among women in college, these trends are even more striking. The segregation index computed for men's and women's choices of major fields of study declined from 46 percent in 1969 to 36 percent in 1978.[63]

Although there is some agreement about the causes of historical trends in earnings ratios, economists disagree as to the relative importance of the factors that may account for the size and persistence of the earnings gap. Some economists argue that virtually the entire wage gap can be explained by the effects of previous and expected "intermittency," the greater tendency of women to leave and reenter the job market,[64] while others stress occupational segregation.[65] Except perhaps for the current group of young women, each generation of women probably tended to underestimate its own future participation in the work force and, therefore, made insufficient efforts to acquire marketable skills. Other economists think that differences in education (which has a qualitative as well as a quantitative aspect) and experience do not explain much more than half of the wage gap.[66] Otherwise unexplained differences are viewed by some as a measure of sex discrimination, while for others they represent incomplete understanding of the factors that determine earnings.

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[58] June O'Neill, "The Trend in the Male-Female Wage Gap in the United States," 3 J. Lab. Econ. S91–S116 (1985).

[59] O'Neill-Braun, p. 46.

[60] O'Neill paper, p. 182.

[61] Polachek paper, pp. 35–37.

[62] Andrea H. Beller, "Occupational Segregation and the Earnings Gap," Consultation, vol. 1, p. 27.

[63] Ibid.

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[64] Polacheck paper, p. 45.

[65] *See, e.g.*, Beller paper.

[66] Goldin paper, p. 17.

Chapter 2

The Wage Gap

The Situation

The wage gap between men and women has been a major factor underlying the debate now taking place over the notion of comparable worth; i.e., that different jobs of purportedly equal value to an employer call for compensation at the same level. No one disputes the existence of a wage gap, but there is wide disagreement as to its size and causes, whether it in whole or in part reflects sex-based wage discrimination, and whether implementation of comparable worth doctrine as an antidiscrimination measure would be appropriate.

Any serious explanation of the pay gap requires consideration of a related marketplace phenomenon, occupational "segregation" by sex. How the two are related is part of the debate. The debate, however, is fundamentally about the pay gap, and about the upward adjustment of wages in jobs held predominantly by women when, by some measurement, these jobs are deemed comparable in worth to higher paying jobs held predominantly by men. "[A]dvocates of comparable worth argue for wage adjustments in 'women's jobs' rather than opportunities to work in other jobs,"[1] for "[i]t is no answer to say that those women who already are in predominantly female jobs could solve their problem by applying for men's jobs. . . ."[2]

The preceding chapter traced the movement of women into the marketplace, sometimes despite barriers to their entry. Their entry into the labor force since World War II can even be described as a mass migration.[3]

However, although the number of women in the work force has increased, the earnings gap has persisted. The commonly cited figure has been that women earn 59 cents for every dollar earned by men. That figure is based on gross annual statistical comparisons made by the U.S. Census Bureau, comparing the annual earnings of full-time working men and women in 1977. The figures cited in the growing body of comparable worth literature vary from study to study, depending upon the type of population considered and on whether the basis of the comparison is annual, weekly, or hourly pay.[4]

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[1] Brigitte Berger, "Comparable Worth at Odds with American Realities" (hereafter cited as Berger paper), in *Comparable Worth: Issue for the 80's* (a consultation of the U.S. Commission on Civil Rights, June 1984, Washington, D.C.) (hereafter cited as Consultation), vol. 1, p. 65.

[2] Ray Marshall and Beth Paulin, "The Employment and Earnings of Women: The Comparable Worth Debate," Consultation, vol. 1, p. 206 (hereafter cited as Marshall paper). *See also* Andrea Beller, testimony, Consultation, vol. 2, p. 18 (hereafter cited as Beller testimony), where she argues that the intended beneficiaries of the comparable worth concept are older women who, unlike many younger women, are not availing themselves of the increased opportunities to enter male-dominated occupations. Of course, advocates as well as opponents of the comparable worth concept agree that entry into traditionally male jobs should not be barred by sex discrimination. Comparable worth, however, focuses primarily on the wages of women in their current jobs.

[3] *See* chap. 1.

[4] See chap. 1, pp. 10 and 11 for a discussion of different measures of the female-male earnings ratio and why they differ. Also see June O'Neill, "An Argument Against Comparable Worth," Consultation, vol. 1, p. 179 (hereafter cited as O'Neill paper).

The 1983 pay ratio, when based on annual earnings of mostly full-time workers, was 63.6 percent,[5] and is 72 percent when based on hourly wages.[6] If only full-time workers between 20 and 24 years old are considered on an hourly basis, the earnings ratio is 89 percent.[7] Women aged 25 to 34 years old earn 80 percent of what their male counterparts earn, and women over 35 earn about 65 percent of the average hourly wage of the counterpart male population.[8]

The importance of looking beyond the gross earnings figures to the characteristics of the populations being compared cannot be overstated. For example, the earnings differential varies by marital status. Men and women who have never married exhibit the smallest differential—2.4 percent by one measure—while the largest differential is found between married men and women—61.6 percent by the same measure.[9] This pattern is believed to arise because the work experience and career orientation of women and men who remain single are more similar than the work profiles of married men and women.[10]

Changes over time in the characteristics of employed women and men have also influenced the changes in the wage gap over time. As explained in chapter 1, the wage gap widened after 1950 because of the influx of married women with relatively less work experience and schooling. Since 1980 the wage gap has narrowed, perhaps reflecting women's recent gains in schooling and work experience.[11]

Recent trends in sex segregation by occupation are consistent with the observed narrowing in the wage gap. Using the Bureau of the Census' detailed occupational categories, "segregation" in 1970 stood at about 62 on a scale of 0 to 100.[12] During the 1970s, however, the level dropped substantially,[13] mostly because of the entrance of women into jobs that once had a firm male majority.[14] According to one estimate, the index of segregation declined between 1972 and 1981 at an average annual rate nearly three times as high as the decline during the sixties.[15]

> The increased number of women becoming accountants, bank officers, financial managers, and janitors contributed heavily to this decline in segregation. Male-dominated occupations that increased their representation of women by at least 10 percentage points during the 1970s include computer programmers, personnel and labor relations professionals, pharmacists, drafters, radio operators, public relations professionals, office managers, buyers and purchasing agents, insurance agents, real estate agents, postal clerks, stock clerks, ticket agents, typesetters, busdrivers, animal caretakers, and bartenders.[16]

The segregation index seems to have started an accelerated decline in the mid-seventies that continued through 1981.[17] For professional occupations, the declines were even larger.[18] The number of female lawyers and judges, for example, increased dramatically, from less than 15,000 in 1972 to about 97,000 in 1982.[19] Women also increased their share of employment in the vast majority of male white-collar occupations during the 1970s:

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[5] *See* chap. 1 for a discussion of earnings ratios and how they have changed over time.

[6] O'Neill paper, p. 179; and June O'Neill, testimony, Consultation, vol. 2, p. 112 (hereafter cited as O'Neill testimony), citing the Bureau of Labor Statistics ratio of hourly earnings in 1983. *See also* Goldin testimony, p. 9; and Ray Marshall, testimony, Consultation, vol. 2 p. 131 (hereafter cited as Marshall testimony). See chap. 1, p. 10, for a discussion of the reasons why the hourly earnings ratio is generally higher than the ratio based on annual earnings.

[7] O'Neill paper, p. 180, and testimony, p. 112.

[8] O'Neill paper, p. 180.

[9] This general finding appears to be universal although the precise magnitude of the wage gap by marital status varies by year, by the other characteristics of the population surveyed, and by the definition of earnings. For example, Solomon Polachek, in "Women in the Economy: Perspectives on Gender Inequality," Consultation, vol. 1, p. 43 (hereafter cited as Polachek paper), calculates an annual income gap for 1970 of 2.4 percent for single men and women compared to 61.6 percent for the married group. The gap in hourly earnings in 1983 between full-time male and female workers (wage and salary) was 4 percent for those never married and 31 percent for those who were married, spouse present. These calculations are based on the Current Population Survey on median usual weekly earnings of wage and salary workers provided by the Bureau of Labor Statistics. These data were adjusted by Commission staff for differences in hours worked per week by full-time male and female workers in the different marital status categories. Victor R. Fuchs in "Differences in Hourly Earnings Between Men and Women," *Monthly Labor Review*, May 1971, pp. 9–15, calculates an hourly wage gap in 1959 of 12 percent for never-married men and women compared to a wage gap of 42 percent for married men and women. These data refer to men and women in nonfarm employment.

[10] See the discussion in the Polachek and Fuchs papers (ibid.)

[11] *See* O'Neill paper, p. 182. *Also see* James P. Smith and Michael P. Ward, *Women's Wages and Work in the Twentieth Century* (Santa Monica, Calif.: Rand Corp., 1984), pp. 77, 78.

[12] Paula England, "Explanations of Job Segregation and the Sex Gap in Pay," Consultation, vol. 1, p. 54 (hereafter cited as England paper). *See* chap. 1 for an explanation of "segregation."

[13] England paper, p. 55; *see also* Andrea Beller, "Occupational Segregation and the Earnings Gap," Consultation, vol. 1, p. 27 (hereafter cited as Beller paper); and Marshall paper, p. 199.

[14] England paper, p. 55.

[15] Beller paper, p. 27. According to Beller, the average annual rate of decline in the index of segregation was -0.74 during the 1970s compared to -0.28 during the 1960s. Ibid.

[16] England paper, p. 55. *See also* Beller paper, p. 27.

[17] Beller paper, p. 27.

[18] Beller paper, p. 27. *See also* U.S. Department of Commerce, Bureau of the Census, *American Women: Three Decades of Change* (1983) (hereafter cited as *Decades*), p. 20, where a U.S. Census

> The professional, managerial, and sales categories experienced approximately threefold, eight- or ninefold, and twofold increases in the percentage of male occupations in which the relative female share increased. It increased in 26 out of 38 male professional occupations, in 11 out of 13 male managerial occupations, and in all 8 male sales occupations. Moreover, between 1972 and 1981, the number of occupations that were male dominated decreased by 20 of which 9 were professional, 2 managerial, 2 sales, and 4 clerical. Exceptional change occurred in the managers and administrators category: from practically none in the sixties, practically all male managerial occupations became relatively less male during the seventies. The differential in the rate of entry of women into male, compared to all, white-collar occupations grew larger during the seventies, indicating an acceleration in women's penetration of male white-collar occupations consistent with our findings for the index of segregation.[20]

As might be expected, new and recent jobholders, rather than older women, have been responsible for most of the decline.[21] Similarly, the recent decline in the wage gap has been much more pronounced for younger men and women.[22]

One commentator cites the contribution improved educational opportunities have made to the movement of younger women into traditionally male jobs.[23] "During the seventies, women increased their number and share of bachelor's degrees in *all* traditionally male fields of study except theology."[24] Women are now nearly 50 percent of law students, and the proportion of female students in the Nation's medical and business schools is rising towards parity.[25] "Between 1972 and 1981 the number of women enrolled in law school. . .rose from 9,075 to 39,728, a 337 percent increase."[26] In 1971–1972, 9 percent of medical degrees were earned by women. By 1979–1980, that number had climbed to 23 percent.[27] For veterinary degrees in the same period, the increase was from 9 percent to 33 percent.[28] The number of students majoring in business increased between 1966 and 1978 by 120 percent, but the increase was 300 percent for women and only 66 percent for men.[29] According to one researcher: "women increased their share of degrees in every subfield [of business and management] except secretarial studies, with the largest gains in accounting and in business management and administration."[30] She further found that:

> The proportion of women majoring in agriculture and natural resources increased from 4.2 percent in 1971 to 29.6 percent in 1980. The proportion of women in architecture and environmental design and in computer and information sciences more than doubled. Although men still clearly predominate in engineering, there was a noticeable increase in the percentage of women among majors in this field, from 0.8 in 1971 to 9.3 in 1980. At the same time, women decreased their number and proportion of degrees in the declining traditionally female fields of education and letters. They also decreased their proportion but increased their number of degrees in the growing, traditionally female fields of nursing and home economics.[31]

One factor sometimes cited as contributing to these recent trends is Title IX of the Education Amendments of 1972, which prohibits sex discrimination in federally assisted education programs or activities.[32] In the opinion of one commentator,

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Bureau table indicates that the number of women rose from 39.9 percent of the professional work force in 1970 to 46.2 percent in 1980.

[19] U.S. Department of Commerce, Bureau of the Census, *Statistical Abstract of the United States: 1984*, table 696 (hereafter cited as *U.S. Statistical Abstract: 1984)*.

[20] Beller paper, p. 28.

[21] Beller paper, pp. 28–29. *See also* England paper, p. 55.

[22] *See* O'Neill paper, table 1, p. 180.

[23] Beller paper, p. 26.

[24] Ibid., p. 29 (emphasis in original).

[25] Berger paper, p. 67.

[26] National Advisory Council on Women's Educational Programs, *Title IX: The Half Full, Half Empty Glass* (1981), p. 30 (hereafter cited as *Half Full, Half Empty)*. Total law school enrollment rose during this period only 24 percent. Ibid.

[27] Ibid., p. 31.

[28] Ibid.

[29] *Decades*, p. 13.

[30] Beller paper, p. 30. *See also* Berger paper, p. 67.

[31] Beller paper, p. 30.

[32] Education Amendments of 1972, Title IX, 20 U.S.C. §§1681–1686 (1982). Prior to Feb. 28, 1984, the Department of Health, Education, and Welfare and its successor, the Department of Education, had generally applied the Title IX ban on sex discrimination to entire educational institutions and all programs and activities of other Federal aid recipients. Lower court decisions had split as to the breadth of coverage that existed under Title IX or Title VI (banning discrimination on the basis of race, color, and national origin in federally assisted programs) and section 504 (banning discrimination on the basis of handicap against qualified handicapped persons in federally assisted programs). *Compare* Rice v. President and Fellows of Harvard College, 663 F.2d 336 (1st Cir. 1981); Hillsdale College v. HEW, 696 F.2d 418 (6th Cir. 1982) *with* Haffer v. Temple Univ., 524 F. Supp. 531 (E.D. Pa. 1981), *aff'd*, 688 F.2d 14 (3rd Cir. 1982); Poole v. South Plainfield Bd. of Educ., 490 F. Supp. 948 (D. N.J. 1980). On Feb. 28, 1984, the Supreme Court ruled that Federal

Title IX has probably enhanced the effectiveness of Title VII in removing barriers to employment opportunity:

> There are other possible explanations than the impact of the statutory amendments for why Title VII was more effective after 1972. One important one is Title IX of the education amendments, enacted in 1972, which prohibits sex discrimination in education. Earlier prohibitions against sex discrimination were limited to employment. Pre-Title IX laws attacked sex discrimination only from the demand side—that is, from the side of the employer—while leaving the supply side unaffected. Simply reducing the barriers to entry faced by women might be insufficient. Women must come forth to enter traditionally male occupations. Title IX, which facilitates women's acquisition of needed skills, should help to accomplish this. Hence, the existence of Title IX probably enabled Title VII to be more effective.[33]

However, although many women are availing themselves of the opportunities to enter higher paying, traditionally male jobs, others are not.[34] As a 1978 U.S. Labor Department study described the situation:

> Despite affirmative action programs and publicity on the career success of women in stereotypical male positions, most women have not changed their career aspirations. They continue to plan careers in traditionally female positions. As a result, they continue to occupy lower paying positions.[35]

Furthermore, although since 1950 relatively more women are completing college and obtaining higher degrees, their postgraduate work, at least at the doctoral level, has largely continued to take place in traditionally female fields.[36] "Although women made gains in agriculture, architecture, business and management, and engineering, the greatest number of women are still receiving [doctoral] degrees in fields that have traditionally attracted the largest numbers of women, such as education and social sciences."[37]

"In the midst of substantial change," as a Census Bureau study concludes, "tradition persists."[38] Despite the trends for younger women, in some occupations the concentration of women continues. Thus, for example, more than 99 percent of all secretaries and more than 95 percent of all registered nurses are women,[39] and more than 80 percent of all elementary school teachers and librarians are women.[40]

Assessing the effectiveness of Title VII, one commentator believes:

> the law has significantly reduced occupational segregation. The data reveal that Title VII increased a woman's chances, compared to a man's, of being employed in a male occupation, and that the 1972 amendments to the law augmented this change. Enforcement of Title VII with respect to sex discrimination narrowed the sex differential in the probability of being employed in a male occupation by about 6.2 percent between 1967 and 1974, and by about 8.3 percent by 1977. Earlier work showed that the net effect of enforcement of Title VII was to narrow the sex differential in earnings by about 7.1 percent between 1967 and 1974 although the gross differential remained unchanged. Further, it was found that gains were larger for the youngest cohorts of women, both those who entered the labor market in the early seventies and those who entered in 1977. Finally, college-educated women appear to have benefited most from equal opportunity laws over this period.[41]

But she also noted:

> Although our results indicate that enforcement of legislation prohibiting sex discrimination can be effective in desegregating the work force, the change appears small when measured against the size of the gap that remains. The data demonstrate that Title VII's enforcement over 7 years diminished sex-based occupational segregation by 13.2 percent (measured as a percentage of the gross difference remaining at the end of the period). Although this change is not insignificant, at that rate it would take between 75 and 100 years for the gap to disappear and for the job distribution to become completely integrated. Even this estimate may be unduly optimistic because enforcement will tend to eliminate the least resistant forms of discrimination first. As time passes it is likely to become

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student aid only subjects a college's student aid program to Title IX coverage. Grove City College v. Bell, 104 S.Ct. 1211 (1984).

[33] Beller paper, p. 26. It is, however, difficult to determine precisely what role Title IX or Title VII has played in women's academic attainments or job advancement. *See* the article by Beller and the critiques of Beller's research in the separate comments by Isabel V. Sawhill, Phyllis A. Wallace, and Mark R. Killingsworth in *Women in the Labor Market*, ed. Cynthia B. Lloyd, Emily S. Andrews, and Curtis L. Gilroy (New York: Columbia Univ. Press, 1979), pp. 352–75.

[34] *See* Beller paper, p. 28; and *Decades*, p. 26.

[35] Berger paper, p. 67, citing U.S. Department of Labor, Employment and Training Administration, *Years of Decision* (1978), vol. 4.

[36] *Decades*, p. 26.

[37] *Half Full, Half Empty*, pp. 29–30. This is the case even though between 1972 and 1980 the number of doctorates given to women increased by 83 percent, while the number awarded to men has been decreasing. Ibid., p. 30.

[38] *Decades*, p. 26.

[39] *U.S. Statistical Abstract: 1984*, table 696.

[40] Ibid.

[41] Beller paper, pp. 25–26. Note, these findings are controversial. See note 33 above. Also see Polachek paper, p. 46, for additional comment on Beller's research.

> increasingly difficult to eliminate all remaining vestiges of discrimination. But it may be unrealistic ever to expect a completely integrated occupational distribution; even in the absence of discrimination, women might choose different occupations and have different qualifications than men. Although it is exceedingly unlikely that women will choose occupations as different as they are now, many of them still might prefer certain types of work to other types (for example, working in an office to operating a crane).[42]

The assumption implicit in much of this commentary is that all occupational segregation necessarily reflects employer discrimination. The last two sentences of the excerpt reflect only the slightest acknowledgement that in a society entirely free of discrimination, there may still be occupational sex segregation—indeed, perhaps some significant sex segregation—as a result of such nondiscriminatory factors as the choices of men and women in the work force unencumbered by employer discrimination.

Causes

The extent to which the lower pay of predominantly female jobs contributes to the wage gap is controversial.[43] There are also substantial differences of opinion about the extent to which discrimination by employers *causes* occupational "segregation." Generally speaking, analysts have come to rely on three different theories, usually advanced in some combination, to explain segregation and the wage gap: They are socialization, discrimination, and human capital.

In this context, socialization refers to the processes (known as cognitive learning and reinforcement)[44] by which children develop job aspirations that are typical for their sex. In one study[45] of middle-class children in 2nd, 4th, and 6th grades, more than half of the girls but only 1 percent of the boys said they wanted to be teachers, nurses, housekeepers, secretaries, or waitresses. By contrast, 57 percent of the boys but only 4 percent of the girls wanted to be firefighters, police officers, auto mechanics, construction workers, repairers, or athletes. "Cognitive learning theory posits that children learn to distinguish males and females, and thereafter they infer from the sex segregation in jobs and roles they observe among adults that this is 'the way things are' and 'the way things should be'."[46] Socialization through reinforcement stems from rewards and punishments. "Parents and others reward girls for traditionally female traits and job aspirations, while rewarding boys for typically male traits and aspirations."[47]

> Girls are taught to emphasize nurturing social skills, physical attractiveness, and domestic responsibility. Boys learn to emphasize technical skills, authoritativeness, and physical prowess. The socialization is by no means immutable, but it molds people with traits and tastes that fit sex-typical jobs. If cognitive learning is the major form of socialization, as Stockard and Johnson (1980) argue, the link between job segregation and socialization becomes circular: Segregation in jobs among adults provides the data for children's learning how roles should be, and this is said to explain job segregation when the generation of children become adults. Yet socialization is never as effective on females as on males. This is because the roles to which females are being socialized have fewer rewards of money and power attached to them.[48]

The argument continues:

> [S]ocialization is effective enough to be reflected in occupational distributions. Women fill most nurturing occupations such as teaching, social work, child care, and counseling. The assumption that domestic work is women's work makes it difficult for women with families to work in elite male occupations that demand extensive overtime hours, travel or geographical mobility. (Nonetheless, women's domestic responsibilities cannot explain the absence of women from many other male-dominated jobs.) The notion that males should hold authority is seen in the lack of women in positions of authority over workers or clients, especially if they are men. The greater emphasis on developing the quantitative, mechanical and physical abilities of boys increases the underrepresentation of women in jobs with these demands.[49]

One analyst divides explanations of the wage gap and occupational segregation between the demand side and the supply side.[50] She argues that socialization's effects are felt mainly on the supply side, i.e., on the choices and qualifications of employees.[51] She adds, though, that it has some effect on the demand side, i.e., on the behavior of employers, because "it also produces employers with discriminatory attitudes."[52]

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[42] Ibid., p. 26.

[43] *E.g.*, the following papers assign a larger role for occupational segregation per se: Beller paper, p. 23; and Paula England, testimony, Consultation, vol. 2, p. 24 (hereafter cited as England testimony). By contrast, Solomon Polachek, testimony, Consultation, vol. 2, p. 21 (hereafter cited as Polachek testimony), and paper, p. 45, and O'Neill testimony, pp. 111, 112–13, and paper, p. 181, suggest that socialization and human capital theory mainly explain occupational sex segregation as well as the wage gap, so that, on net, occupational segregation contributes little to the wage gap.

[44] England paper, p. 55.

[45] England paper, p. 55, citing a 1979 study by Nemerowicz.

[46] England paper, p. 55.

[47] Ibid.

[48] Ibid.

[49] Ibid., pp. 55–56.

[50] England testimony, p. 22.

This leads to a second theory that has been advanced to account for the wage gap and occupational segregation, namely, discrimination. There are two variations. The first, known as the crowding hypothesis, asserts that:

> Discrimination against women in certain occupations by employers, employees, and consumers acts as a barrier to their entry into those occupations and results in fewer women being hired. How many fewer will depend upon the extent of the inclination to discriminate as well as on how much it costs to do so. Not only will these occupations become male dominated, but the decline in demand for women relative to men may also lower women's relative earnings. (Of course, direct wage discrimination is expressly prohibited under the Equal Pay Act and Title VII of the Civil Rights Act of 1964.) Because this discrimination imposes an artificial barrier to the entry of labor into these occupations, average wages in them will rise and they will become artificially high-wage jobs. The restrictions upon entry into this male sector force some women, if they want to find employment, to crowd into occupations in which employers do not discriminate against them, or discriminate less. Crowding in this other sector pushes wages below what they would be in the absence of discrimination. It is this fact—that discrimination causes wages in the female sector to be below the free-market level—that provides the basis for the argument in favor of comparable worth.[53]

The second variation is that employers pay women less simply because they want to, either because the employers are themselves the product of biased socialization and its resultant discriminatory attitudes,[54] or because they underestimate the potential productivity of women.[55] According to one commentator: "crowding does not explain the lower pay of female jobs. Rather, I think that employers, by custom, have said that if a job's done by women, they're going to pay it less. Those differentials have been perpetuated over time."[56] In short, apart from discrimination in hiring, which crowds women away into certain jobs and keeps them out of others, this commentator asserts that employers pay women less because they are women. The plausibility of this view was challenged by another commentator:

> The ability of firms to wield such power is highly questionable. If a firm underpaid workers in women's occupations, in the sense that their wages were held below their real contributions to the firm's receipts, other firms would have a strong incentive to hire workers in these occupations away, bidding up the wages in these occupations. Thus, competition would appear to be a force curtailing employer power. This process could only be thwarted by collusion, an unrealistic prospect considering the hundreds of thousands of firms.[57]

A third theory put forward to account for the pay gap, and occupational sex segregation, concerns human capital. This view "links occupations and wages to lifetime labor force participation and the division of labor within the family."[58] The explanation here is that many variables determine the value of an individual's services to the labor market. Examples of these variables include education, strength, and dexterity; the hours worked per week; home responsibilities; and expectations as a worker.[59] Even those who are skeptical of this theory admit that it has some explanatory power. "[T]heoretically," said one commentator, "I find them both [the human capital theory and the crowding theory] persuasive, and you know, if I had to take a stab, I'd say I think it's 50–50."[60]

The human capital theory relates lifetime labor force experience to earnings in the marketplace. Sex differences in actual work experience have been found to contribute significantly to the wage gap.[61]

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[51] England paper, p. 55.

[52] Ibid., p. 57.

[53] Beller paper, p. 24.

[54] England paper, p. 57.

[55] *See* England paper, pp. 57–58.

[56] England testimony, p. 25.

[57] O'Neill paper, pp. 182 and 183.

[58] Polachek paper, p. 42.

[59] Claudia Goldin, "The Earnings Gap in Historical Perspective," Consulation, vol. 1, p. 15.

[60] Beller testimony, p. 42. *See also* England paper, beginning at p. 60, and Marshall paper, beginning at p. 202.

[61] *See* Polachek paper, p. 45. *See also* the review in June O'Neill, "Earnings Differentials: Empirical Evidence and Causes," in *Sex Discrimination and Equal Opportunity,* ed. Gunther Schmid and Renate Weitzel (Gower Publishing Co.), p. 82. O'Neill notes:

> those studies that do not have an observed measure of women's work experience and try to infer it by estimates of potential exerience (for example, by using age or age of school leaving subtracted from current age) find little or no effect of "work experience" on the wage differential. . . .But this method of accounting for work experience guarantees the outcome because in most countries women's actual work experience falls short of potential experience. The wage gap is reduced substantially in those studies in which longitudinal or retrospective information was used to determine actual years of labor market experience, the

Some analysts have also assigned a role to the pattern of work experience, i.e., whether a given number of years of work experience were continuous or intermittent.[62] A 1979 study by the Bureau of the Census noted that of women surveyed, about two-thirds interrupted their work for 6 months or more for family reasons; less than 2 percent of the men did.[63] The study concludes that these interruptions themselves explain little of the wage gap.[64] However, even the Census Bureau study, which could only attribute little of the wage gap to intermittency, asks if this means the rest of the gap is due to "labor market or societal discrimination":

> A prudent reply is that the remaining gap may be due to the effect of a number of factors. One factor that has been suggested as a partial reason for the earnings gap is the possibility that some women may choose relatively low-paying jobs if those jobs allow greater flexibility in the carrying out of family-related activities.[65]

Elsewhere the study emphasizes the importance of an individual's own expectations:

> It should be noted that decisions regarding years of schooling, occupation, and familial interruptions are not independent. *Women who expect to be out of the labor force for significant periods of time during their working-age years are likely to make different decisions regarding schooling and occupation than women who expect to minimize labor force interruptions.*[66]

The effect on the wage gap aside, many women do choose occupations more conducive to meeting family responsibilities: "[W]hen people have an expectation of dropping out, they choose different type jobs to begin with. In fact, they choose different type college majors, and they choose different type courses even as early as high school and before."[67]

This point has been further substantiated by studies on the effects of flexible work schedules on family life. Two researchers surveyed 700 workers in two Federal agencies and reported that women, characteristically, had less demanding jobs than men, even when education and training were comparable. They concluded that: "This disparity is due less to discrimination, in the views of our interviewees, than to the fact that they *chose* less demanding jobs because of their greater involvement in—and responsibility for—their children on a day-to-day basis."[68]

> One study after another gives further credence to the continued commitment of American women to the family, the welfare of its members, and to the family household. After more than 50 years of viewing the family as standing on its last legs and individuals defecting from it in droves, even more narrowly focused researchers have to concede the continuing importance of this institution in the lives of most ordinary people. American women themselves, it seems, have rarely strayed from this commitment. In order to contribute to the well-being of their families, they entered the paid labor force in the first place. It is for this reason that they have been primarily drawn to those types of jobs that offer opportunities for part-time and flexitime work schedules. By the same token, it is precisely these types of careers that permit easy exit and reentry, and that can be reconciled to their life plans, plans in which the family and children play a central role. Teaching, nursing, clerical work, and the like are the types of jobs that, in a felicitous way, allow for a reconciliation between the world of the family and the world of work.[69]

"For women with children," a previous study by the U.S. Civil Rights Commission notes, "child care becomes a central concern in deciding whether to work, which hours, and where to seek employment."[70]

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pattern and length of career breaks and current job tenure. . . .

[62] *See* the analysis and evidence on the effects of skill depreciation during periods of labor force withdrawal in Jacob Mincer and Haim Ofek, "Interrupted Work Careers: Depreciation and Restoration of Human Capital," *Journal of Human Resources* (1982).

[63] U.S. Department of Commerce, Bureau of the Census, *Lifetime Work Experience and Its Effect on Earnings: Retrospective Data From the 1979 Income Survey Development Program,* Current Population Reports, series P-23, no. 136 (1984), p. 1 (hereafter cited as *Lifetime Work Experience and Its Effect on Earnings).*

[64] Note that this study relied on data with only a crude retrospective question to measure work experience. The data did not include information about whether the work interruption was recent or far in the past. The paper by Mincer and Ofek cited above was based on detailed panel data.

[65] *Lifetime Work Experience and Its Effect on Earnings,* p. 5. This is consistent with Polachek's thesis, which emphasizes the role of expected intermittency in women's career choices.

[66] Ibid., p. 2 (emphasis added).

[67] Polachek testimony, pp. 20–21.

[68] Berger paper, p. 69, citing a study by Halcyone Bohen and Anamaria Viveros-Long, *Balancing Jobs and Family Life* (Temple Univ. Press, 1981) p. 212 (emphasis in original).

[69] Berger paper, p. 69.

[70] U.S. Commission on Civil Rights, *Women Still in Poverty* (1979), p. 30. This is particularly significant in light of statistics showing that in 1980, 45 percent of married women with children under age 6 and 62 percent of mothers with school-age children were in the labor force. *Decades,* p. 18. *See* England paper, p. 54, where she states that by 1980, 45 percent of married women with children under 6 and "41 percent of those with children under 3 were in the labor force."

Measuring Discrimination

Scholars, whatever their views on comparable worth, acknowledge that no purely statistical analysis, or any other method, can isolate the portion of the wage gap attributable to discrimination. "Much research on women's earnings suggests discrimination but cannot prove it."[71] The methods in general use quantifiable variables such as work experience or educational attainment,[72] and in some cases what remains—the unexplained portion of the gap—is attributed to discrimination. One commentator explains that: "[We agree] that the wage gap is due to things other than discrimination,. . .[b]ut most studies leave a residual unexplained by other things, which suggests a latitude for discrimination."[73] Yet, another expert noted, "On the discrimination hypothesis. . .we cannot measure discrimination directly. We simply don't have a measure."[74]

> Any unexplained [wage] differential can be due to discrimination, and many economists would argue that the unexplained differential is due to discrimination. It was alluded to before that we are trying to chip away at that differential. We try to explain as much of the differences as we can on the basis of productivity-related factors because we're all interested in finding out the truth about this.
>
> To the extent that wage differentials, in fact, are due to productivity differences, that's important to know. *The part we can't explain may be due to some of the other variables that we have not yet been able to control for.* But, as I said before, they would have to be uncorrelated with the variables we are already controlling for, for them to add a lot of explanatory power, which is not very likely. The rest of the unexplained differential *may* be due to discrimination.[75]

Another expert adds:

> I am willing to believe that there is some amount of pay discrimination in the market. If you asked me to prove it, I'd tell you I can't, and I frankly don't think the economists this morning can either.
>
> I think they can prove a differential, and they, it seems, as best I understood them, conclude that all the variance that they cannot explain must, therefore, be the result of discrimination.
>
> To my eye, what they end up with is unexplained variance. They don't know what it's attributable to, and neither do I.[76]

This last point has been recognized by the Census Bureau:

> Although it is possible to quantify variables such as work experience and educational attainment, it is more difficult to measure differences in hiring and promotion practices. Social scientists have not been able to measure directly the possible effects of sex discrimination on women's earnings. After all measurable variables are included in an equation to account for earnings differences between women and men, there is almost always a residual difference that cannot be explained. Some researchers argue that this residual difference may arise partly from sex discrimination although data collected by the Census Bureau can neither prove nor disprove this assertion.[77]

Another expert believes that the problem is that "there may be other factors which involve us in unobservables and that are very, very hard to get at."[78] Any attempt to determine the extent of discrimination, she states, "must bring to bear the weight of evidence from many, many corners, qualitative evidence, evidence from surveys, theoretical evidence, empirical evidence."[79] In addition, she continues:

> It seems as if the evidence concerning work expectations is very strong, and it points to other factors outside the labor market. It points to factors within society and within the family.
>
> This is not to say that the labor market does not have barriers and does not have discrimination. But I think the best way to get at it is to try to leave it as a residual and to piece away and to pick away.[80]

The problem, according to another expert, is that most analysis of the earnings gap is conducted at aggregate levels:

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[71] *Decades*, p. 21.

[72] Ibid.

[73] Marshall testimony, p. 121; *see also* Marshall paper, p. 211, in which he states that "few objective analysts could argue that there is *no* discrimination against women in the labor market" (emphasis in original). Important to emphasize is that the residual is what is left unexplained after portions of the pay gap are accounted for by nondiscriminatory factors. An unexplained residual, therefore, is simply that—unexplained. It is not necessarily evidence of discrimination or a reflection of discrimination. *See also* Marshall testimony, p. 120, where he states that "equations cannot prove discrimination or the absence of it."

[74] Beller testimony, p. 17.

[75] Ibid., p. 42 (emphasis added).

[76] Alvin O. Bellak, testimony, Consultation, vol. 2, p. 68.

[77] C. Lewis Kincannon, Deputy Director, Census Bureau, statement before the U.S. Congress, Joint Economic Committee, *Hearings on Women in the Workforce*, Nov. 9, 1983.

[78] Goldin testimony, p. 8.

[79] Ibid.

[80] Ibid.

> Unfortunately, studies based on these aggregate models often do not adequately include factors used in wage setting practices, such as differences in employee work behaviors; in the education, skills, and abilities to perform specific jobs; in the specific content of the work; in the interaction or match between employee qualifications and the work requirements; in the employer's wage policies; or in union objectives and relationships to employers.[81]

Another expert asks if the residual is a measure of discrimination or simply a measure of our ignorance:

> If all the productivity differences between women and men are not accurately identified and measured, labor market discrimination would be overestimated by the unexplained residual. Many variables were omitted from [my] analysis and from other studies because relevant data are not available. These include details on the quality and vocational orientation of education; on the extent of other work-related investments, such as job search; and on less tangible factors, such as motivation and effort. Differences in these factors could arise from the priority placed on earning and income versus fulfilling home responsibilities. If women, by tradition, assume the primary responsibility for homemaking and raising children, they may be reluctant to take jobs that demand an intense work commitment.
>
> On the other hand, the unexplained residual may underestimate discrimination if some of the included variables, such as years of training to learn a job, or the sex typicality of occupations, partially reflect labor market discrimination. Some employers may deny women entry into lengthy training programs or be reluctant to hire them in traditionally male jobs. It is difficult with available data to distinguish this situation from one where women choose not to engage in training because of uncertainty about their long-run career plans or choose female occupations because they are more compatible with competing responsibilities at home.[82]

It is not surprising, then, in light of the variety of studies and different measures, that analysts have reached different conclusions about what part of the wage gap can be attributed to observable, nondiscriminatory factors and what part constitutes the unexplained residual, which may or may not include a percentage attributable to discrimination.[83] One commentator, as noted above, attributes half of the pay gap to human capital factors and half to crowding.[84] Another suggests that certain human capital factors explain 44 percent of the earnings differences between white men and white women, 32 percent of the differences between white men and black women.[85]

Another researcher discounts the crowding thesis as being, at most, "only moderately important in explaining gender differences in earnings" among some segments of the population, and of virtually no importance among narrower segments.[86] "[E]ven when using the most primitive models," he further states:

> the human capital approach that links lifetime labor force participation to earnings in the marketplace explains almost 50 percent of the gender difference in earnings. When using statistical specifications that more accurately reflect the impact of expected intermittency on initial schooling and job choices, close to 100 percent of the wage gap can be explained.[87]

Conclusion

Some advocates of comparable worth maintain that the market is still discriminatory and that, moreover, women still suffer from the effects of past discrimination: Occupational sex segregation and the wage gap flow largely from these. Thus, whenever workers in a job held mostly by women are paid less than workers in a job held mostly by men, antidiscrimination measures must be taken.[88] Other advocates of comparable worth use the simple, allegedly unjust fact of a pay gap between men and women as the basis for equalizing pay for jobs that are, according to the "evidence," of comparable worth to an employer.

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[81] G.T. Milkovich, "Wage Discrimination and Comparable Worth," *Industrial and Labor Relations Report*, vol. 19, no. 2 (Spring 1982), p. 9.

[82] O'Neill paper, p. 181.

[83] Although most experts, including supporters of the comparable worth concept, agree that the portion of the wage gap attributable to discrimination cannot be identified, this, of course, should not be construed to mean that sex-based wage discrimination is nonexistent. It only means that it cannot be quantified as a particular portion of the wage gap by current statistical techniques.

[84] Beller testimony, p. 42. Opponents and proponents of comparable worth whose research focuses on explanations of the earnings differential generally also criticize the other side's explanations. *See, e.g.*, Polachek paper, p. 40, where he criticizes the large role England assigns to occupational segregation as responsible for the wage gap. Rather, Polachek maintains that human capital theory can explain the wage gap *and* segregation. *See also* Polachek paper, p. 46, where he criticizes Beller's use of regression analysis. *But see* England paper, p. 57, and Marshall paper, p. 202, where they criticize human capital theory. Important to note is that they do not fully address the expectation model, perhaps due to a perceived difficulty of measurement.

[85] England paper, p. 60, citing a study by Corcoran and Duncan (1979).

[86] Polachek paper, p. 37. It should be noted that England rejects the crowding thesis. England paper, p. 62.

[87] Ibid., p. 45 (emphasis omitted).

[88] Blumrosen, *Wage Discrimination, Job Segregation, and Title VII of the Civil Rights Act of 1964*, 12 Mich. J. L. Ref. 399 (1979).

Caution is needed. Our continuing inability to attribute precise causes to the wage gap—and, indeed, our uncertainty as to how much of any residual is the result of sex-based wage discrimination against predominantly female jobs—has profound consequences for the efficacy of comparable worth as an antidiscrimination measure.

To say we are uncertain is not to deny that there are still instances of sex discrimination in employment, including in the setting of wages. Courts and administrative agencies, for example, continue to find specific cases of such discrimination. But if the wage gap is in large part the result of nondiscriminatory factors—familial and societal socialization,[**] female labor force expectations and labor force participation, or discrimination beyond an employer's control (such as that which may occur in educational institutions)—then an antidiscrimination "remedy" imposed on employers is the wrong answer. For example, changes in socialization patterns, even if desirable, are not the proper subject of government civil rights policy. In instances where employers are not the parties responsible for discrimination, it is unfair to expect them to bear the burden of remedying discrimination.

Sex discrimination in education has undoubtedly affected women's job choices in the past as well as in the present. Employers, however, do not discriminate in education; educators do. The remedy for sex discrimination in elementary, secondary, and postsecondary schools must be aimed at these schools, not at employers who hire the graduates of the educational system as they find them.[**]

Occasionally, vague notions about "societal discrimination" are put forward and about the responsibility of employers to redress any imbalance that exists among groups in the work force, such as the pay gap, regardless of its real cause and regardless of cost. In addition to the anti-intellectual quality of these notions—which would prefer ignorance of the real causes of imbalances—the concept of "societal discrimination" is an evasion of the issue that employment antidiscrimination laws were designed to address. These laws are aimed at outlawing and remedying *specific* employer discrimination, however subtle and however many the victims, and to ensure equal employment opportunity for all. They are not aimed at redressing the results of socialization outside the workplace or alleged discrimination in education and in other components of society. Nor are these laws aimed at correcting the effects of decades of enforcement of earlier protective laws enacted by States or prior discrimination committed by other persons or entities.

The vigorous enforcement of Title VII and the Equal Pay Act against discriminating employers is the proper response to wage discrimination. It is also the proper response to whatever part of the wage gap is caused by such discrimination. Holding employers responsible for their discriminatory behavior is wholly appropriate; holding them responsible for conditions beyond their control, and not of their making, is not.

[**] The manner in which parents socialize their children, and the manner in which children are socialized by such components of the larger culture as television, movies, newspapers, and peers, are not properly matters for government *antidiscrimination* policy. If parents give their daughters dolls and their sons firetrucks—and if this kind of socialization affects the children's ultimate job choices—then government antidiscrimination policy must accept this outcome as legitimate.

[**] Again, it is stressed that an employer who hires in a discriminatory manner based on sex, or who pays women unequal wages for equal work, or who otherwise pays them less because they are women—i.e., who does not hire and treat the graduates of the educational and socialization processes as he or she finds them, but injects gender into his or her employment process—should feel the full force of current antidiscrimination law.

Chapter 3

Job Evaluation, Wage Determination, and Comparable Worth

Job evaluations play a key role in comparable worth policy. Comparable worth advocates contend that wages determined in the market reflect the undervaluation (based on discrimination) of jobs predominantly held by women.[1] Job evaluations that purport to measure the value of different jobs independently of the market have been used to establish whether there is discrimination in an employer's pay system (e.g., the Washington State case). Job evaluations have also been used as the basis for determining how different jobs should be paid in situations where comparable worth has been proposed or adopted (e.g., Minnesota, San Jose, Washington State, Wisconsin).

Although there are many different job evaluation systems, most systems attempt to rank jobs by assigning a point value in four main categories: knowledge and skills required for the job, mental demands, accountability, and working conditions. Several complex questions are raised. Is this procedure objective? Is it sensible to base salaries or wages on a job evaluation? If two jobs with the same number of points are paid differently and the higher paid job is male, does this imply discrimination?

This chapter addresses these issues and provides background information to aid in analyzing them. The chapter first reviews briefly the forces that are expected to determine wages in a market system. It then describes commonly used job evaluation procedures and discusses the role such evaluations have played in firms. The possible consequences of basing pay on job evaluations, as comparable worth advocates suggest, are evaluated.

How Wages Are Determined in a Market (Market Notions of Value)

In a market system, wages depend on supply and demand—that is, a balancing of the amount employers are willing to pay for the worker's services and how much is needed to induce the worker to do a particular job. Employer demand (willingness to pay), in turn, depends primarily on two factors: labor productivity in the job (which, in turn, depends on factors such as capital accumulation and technological change) and the value to consumers of the products produced with the labor. These factors do not necessarily have anything to do with the employer's beliefs about the intrinsic worthiness of the occupation. They are related to the employer's assessment of the contribution made by a particular type of work to the firm's output and a comparison of that contribution with the wage required.

On the supply side, a number of factors influence the wage that workers, on average, are willing to accept for a particular job. For example, jobs can have different costs to workers, in the form of the amounts of formal education and on-the-job training required for entry. Jobs also differ in the amount of pressure and responsibility they entail, and they differ in the working conditions they provide. They vary in physical safety, flexibility of hours, pleasantness of surroundings, and monotony of the work. Moreover, and making matters even more complex, individual workers differ in how they evaluate all these subjective factors. To one worker a plumbing job might appear to be dirty and unpleasant work, but to another, interested in solving plumbing problems, the unpleasantness may hardly be an important factor.

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[1] *See, e.g.*, Andrea Beller, "Occupational Segregation and the Earnings Gap," in *Comparable Worth: Issue for the 80's* (a consultation of the U.S. Commission on Civil Rights, June 1984, Washington, D.C.) (hereafter cited as Consultation), vol. 1, pp. 23–24.

In sum, a market wage reflects an ongoing process that takes account of the scarcity of talents, the tastes of heterogeneous individuals, the demands of consumers, and the availability and cost of other resources and technology. There are simply too many factors interacting in highly complex ways for any group of planners or evaluators to determine what the market wage structure should be.

Even those experts who have worked with and studied the validity and accuracy of the concept of job evaluation agree about the importance of the external labor market in determining wages. According to Dr. Alvin Bellak of Hay Associates, a major practitioner in the field of job evaluation: "Implicit in our [firm's] ultimate pricing recommendations to [our] clients was the principle that jobholders were drawn from, and, therefore, should be paid competitively with, a defined labor market."[2]

Professor Herbert Northrup of the Wharton School, University of Pennsylvania, has stated:

> Job evaluation and wage classification schemes rationalize the internal wage relationships; *they are not the means by which wages are set.* Instead, wage rates or brackets must be assigned to the various classifications. The rates are determined by the employer, or through collective bargaining, *with the market as the guiding force.* What the classification scheme does is to provide that the lowest rated and highest rated jobs receive the lowest and highest wages, respectively.
>
> *The market also plays a role in the classification scheme.* Once low-rated secretaries are now classified at much higher levels—as executive secretaries, or administrative or executive assistants—for a very simple reason. Market realities have forced a reexamination of their role and an appreciation of their skills. Likewise, their salaries have risen because of their short supply.[3]

Similarly, Dr. June O'Neill of the Urban Institute has maintained:

> By comparable worth I mean the view that employers should base compensation on the inherent value of a job rather than on strictly market considerations. It is not a new idea—since the time of St. Thomas Aquinas, the concept of the "just price," or payment for value, has had considerable appeal. Practical considerations, however, have won out over metaphysics. *In a free market, wages and prices are not taken as judgments of the inherent value of the worker or the good itself, but reflect a balancing of what people are willing to pay for the services of these goods with how much it costs to supply them. Market prices are the efficient signals that balance supply and demand. Thus, in product markets we do not require that a pound of soybeans be more expensive than a pound of Belgian chocolates because it is more nutritious, or that the price of water be higher than that of diamonds because it is so much more important to our survival.* If asked what the proper scale of prices should be for these products, most people—at least those who have taken Economics 1—would give the sensible answer that there is no proper scale—it all depends on the tastes and needs of millions of consumers and the various conditions that determine the costs of production and the supplies of these products.
>
> What is true of the product market is equally true of the labor market. There is simply no independent scientific way to determine what pay should be in a particular occupation without recourse to the market. Job skills have "costs of production" such as formal schooling and on-the-job training. Different jobs also have different amenities that may be more or less costly for the employer to provide—for example, part-time work, safe work, flexible hours, or a pleasant ambience. And individuals vary in their talents and tastes for acquiring skills and performing different tasks. The skills required change over time as the demand for products changes and as different techniques of production are introduced. And these changes may vary by geographic region. In a market economy, these changing conditions are reflected in changing wage rates, which in turn provide workers with the incentive to acquire new skills or to migrate to different regions.
>
> The wage pattern that is the net outcome of these forces need not conform to anyone's independent judgment based on pre-conceived notions of comparability or of relative desirability.[4]

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[2] Alvin O. Bellak, "Comparable Worth: A Practitioner's View," Consultation, vol. 1, p. 76 (hereafter cited as Bellak paper).

[3] Herbert R. Northrup, "Comparable Worth and Realistic Wage Setting," Consultation, vol. 1, p. 96 (emphasis added) (hereafter cited as Northrup paper).

[4] June O'Neill, "An Argument Against Comparable Worth," Consultation, vol. 1, pp. 177–78 (emphasis added) (hereafter cited as O'Neill paper).

Professor O'Neill provided another example of this phenomenon:

> The clergy. . .earn about 30 percent less than brickmasons. Yet, the clergy are largely college graduates; the brickmasons are not. Both occupations are more than 95 percent male—so one cannot point to sex discrimination. Possibly the reason for the wage disparity lies in unusual union power of construction workers and is an example of market imperfections. But other explanations are possible too. The real compensation to the clergy, for example, may include housing and spiritual satisfaction as fringe benefits. On the other hand, the high risk of unemployment and exposure to hazards of brickmasons may be reflected in additional monetary payments. If enough people require premiums to become brickmasons and are willing to settle for nonmonetary rewards to work as clergy, and if the buyers of homes are willing to pay the higher costs of brickmasons, while churchgoers are satisfied with the number and quality of clergy who apply, the market solution may well be satisfactory.[5]

Professor O'Neill has further stated that:

> One can also think of examples of jobs that initially may seem quite comparable but that would not command the same wage, even in nondiscriminatory and competitive markets. The following example is based on a case that has been used before, but it illustrates the point so well it bears repeating. Consider two jobs—one a Spanish-English translator and the other a French-English translator. Most job evaluators would probably conclude that these jobs are highly comparable and should be paid the same. After all, the skills required, the mental demands, the working conditions, and responsibility would seem to be nearly identical. But "nearly" is not equal, and the difference in language may in fact give rise to a legitimate pay differential. The demand for the two languages may differ—for example, if trade with Spanish-speaking countries is greater. But the supply of Spanish-English translators may also be greater. And this would vary by geographic area. It would be difficult to predict which job will require the higher wage and by how much in order to balance supply and demand.
>
> What the market does is to process the scarcity of talents, the talents of heterogeneous individuals and the demands of business and consumers in arriving at a wage. The net outcome would only coincidentally be the same as a comparable worth determination. There are simply too many factors interacting in highly complex ways for a study to find the market clearing wage.[6]

Moreover, there are many labor "markets" and submarkets within a given firm; for example: a unionized blue-collar market[7] (with numerous submarkets depending upon the number of unions involved); a nonunionized white-collar market; a market based upon job function (which might or might not overlap with the nonunion white-collar market); and even a product division market in which wages were higher for those working on "glamour" products, and lower in "low tech" product divisions.[8]

Each of these markets, even within a single firm, might well have a different salary structure. The existence of a number of pay scales within a single firm ought not to be taken as a sign of "chaotic" or "discriminatory management,"[9] but rather as the rational functioning of "the various labor markets from which its people are drawn."[10]

The Neoclassical and Institutional Analysis of Wage Determination

Neoclassical Theory

A complex relationship exists between any form of job evaluation or classification system and the external labor market. Each contributes to determining the wage or salary level[11] of any job or group of jobs in the firm[12] although the precise contribution of either is impossible to know. This can vary from firm to firm and from job to job.

According to Professor Donald Schwab: "The traditional and still dominant perspective of employee worth and equitable pay differentials. . .results from an amalgam of two different schools of economics."[13] The first school of economic thought places its primary reliance on the external labor market as the determinant of wage levels. Salaries are determined primarily by the supply of, and demand for, a particular service or job skill. "Why do registered nurses receive higher average weekly wages than carpenters? They do so because they can command higher weekly wages in the external labor market."[14]

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[5] Ibid., p. 178 (footnote omitted).

[6] Ibid., pp. 178-79. In a footnote to her paper, Professor O'Neill cited the following example. If brickmasons' wages are artificially high because of union power, the market would be unstable. More workers would desire to be brickmasons than would be hired at the artificially high wage. Would comparable worth policy help the situation? Not likely. A comparable worth solution would likely require higher pay for clergy than for brickmasons because of the heavy weight placed on readily measured items like education. A wage for clergy that is too high would be unstable. Only the removal of the union power or restrictions on union power to bargain collectively would change these facts. And no one has suggested imposing limits on the rights of unionized workers to bargain collectively over wages or working conditions. Ibid., p. 178.

[7] Bellak paper, p. 79.

[8] Ibid.

[9] Ibid., p. 80.

[10] Ibid.

[11] The term wages has typically been applied to jobs where compensation is based on hourly rates; salaries typically refer to positions, usually white collar, where compensation is paid on a weekly or biweekly basis. The terms are used synonomously in this chapter.

[12] The discussion in this chapter generally applies to private and public organizations, and to profit and not-for-profit organizations.

This economic theory is central to the neoclassical or marginal productivity theory of wage determination,[15] which "has remained the principal economic explanation of micro wage-setting behavior for over 100 years."[16] Essentially, the theory states that the nurse's wages are higher than those of the carpenter because the marginal value of a nurse's output (i.e., the value of the last unit of output) is higher than the marginal value of the carpenter's output.[17]

Using external markets to set wage rates enables employers to remain economically competitive with other firms in their industry; if an employer's wage rates rise above the external market level, the employer will be unable to compete effectively.[18] A second advantage is that an employer is able to relate wages, albeit imperfectly, to employee productivity. High productivity will cause the use of labor in place of machinery; lower levels will cause employers to substitute equipment for employees.[19] A third reason for a firm to tie wage rates to the external market is that this assures employees that they are being fairly compensated in relation to their fellow workers. It holds employee dissatisfaction with organizational wage-setting policies to a minimum[20] and can be useful in attracting and retaining key employees.[21]

The Institutional Theory

A complementary approach to the theory of marginal productivity is institutional theory. According to this theory of wage determination, there are, broadly speaking, two labor markets: the horizontal and the vertical.[22] Horizontal labor markets are found when there is a strong attachment on the part of employees to a particular profession or skilled blue-collar job—e.g., law, medicine, skilled construction trades, or printing. In a horizontal market, there is typically a great deal of mobility between firms; employee skills are readily transferrable from one employer to another.[23] Frequently, it does not matter if the new employer is in the same line of business as the old employer.[24] To determine wage rates in the horizontal segment of the markets, employers must rely on the external labor market, and job evaluation is unusual.[25]

But in the vertical labor market, job evaluations can have a great effect. Typically, such markets are found within large firms[26] that have only "a limited number of jobs or occupations where the firm hires from the external labor market."[27] These jobs tend to be at the entry level, whether they are managerial, skilled craft, or professional positions.

Positions above the entry level are generally filled by promoting from within. Merit and seniority are the chief factors in making these decisions,[28] and so the external labor market has much less to do with compensation.[29]

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[13] Donald Schwab, "Using Job Evaluation to Obtain Pay Equity," Consultation, vol. 1, p. 83 (hereafter cited as Schwab paper).

[14] Ibid., citing a study by Professor Ward in 1982.

[15] Ibid., p. 84.

[16] Ibid.

[17] Ibid.

[18] Ibid. In response to a question about the economic impact of a 10 or 15 percent wage increase that was not accompanied by a similar increase in productivity, Professor Andrea Beller stated: "If the wages were raised above the productivity of those workers to the firm, then you would expect to see them hiring fewer of those workers." Testimony, Consultation, vol. 2, p. 45. Similarly, Professor Solomon Polachek pointed out that such wage increases would cause the price of the product to rise as well, although Professor Beller thought that price increases would only occur in a "perfectly competitive firm." Ibid. Professor Polachek also stated that "if you increase wages by. . .10 to 15 percent, in one particular firm, that is, in a competitive industry, then in the extreme the firm could actually go out of business." Ibid., pp. 45–46.

[19] Schwab paper, p. 84. Of course, the external market does not operate without constraints. Constraints imposed by internal firm personnel policies, collective-bargaining agreements with labor unions, and government regulatory activity will, to some degree, decrease the effect of the external labor market on wage rates. Ibid.

[20] Ibid.

[21] Ibid., p. 85.

[22] Ibid., p. 84.

[23] Ibid.

[24] Ibid. Certain skills such as computer programming, accounting, and legal skills are typically transferrable across industry lines, as the employer needs they address, e.g., computer operations, maintenance of the employer's financial books, and tax, employment, securities, and other aspects of law are common to many industries.

[25] Schwab paper, p. 84 (emphasis omitted).

[26] Ibid.

[27] Ibid.

[28] Ibid.

In some cases, in fact, there may not even be an external market for a set of job skills. This is particularly true in high-technology industries, where rapid technological and product changes cause the requirements of particular jobs to change quickly.[30] Moreover, in vertically structured firms, the demand for a particular job skill depends on the need for other job skills up and down the line, a factor that further weakens the sway of the external labor market in setting wages. For example, in manufacturing automobiles, the need for any given job skill on the production line will have a direct relation to the need for other job skills on the production line.[31]

According to Professor Schwab: "jobs in vertically structured, internal labor markets can be thought of as falling on a continuum. At one extreme are key or benchmark jobs. These jobs tend to be fairly standardized (i.e., employed in many firms). Ports-of-entry jobs typically fall into this category as do some other nonentry-level jobs."[32] Entry-level jobs do tend to be responsive to supply and demand conditions,[33] but in the higher reaches of the vertical spectrum, the firm must devise other methods for setting wage rates, since the external job market will have limited applicability to such positions.

Job Evaluation Systems: The Historical Perspective

Historically, businesses did not employ formal job evaluation systems.[34] Until unions secured their legal status with passage of the Wagner Act in 1935,[35] there was little pressure on employers to rationalize or negotiate wage and salary structures based on formal evaluation systems.

By the time the United States entered the Second World War, pressures on management to adopt such systems had increased greatly. Wage disputes, including those involving claims that similar jobs were not being similarly compensated, were the subject of compulsory arbitration proceedings before the War Labor Board.[36] Moreover, unions began seeking, and winning, contract provisions that called for payment of equal wages for jobs requiring similar skills.

Job evaluation systems were often used by employers to defeat union organizing drives.[37] "Just as all personnel activities were directly and indirectly stimulated by the expanding labor movement, job evaluation was used by management partly to deter or prevent unionization, partly to rationalize its wage scales prior to unionization. . .and partly to stabilize the [employer's] wage structure and eliminate continuous bargaining over particular rates after unionization."[38] By establishing a wage system that appeared equitable to his or her work force, an employer could hope to reduce dissatisfaction among the employees.

Unions themselves also sought evaluation systems, often as a means of eliminating dissension among their members:

> [T]he bargaining process breaks down without stable wage relationships. Negotiators for new contracts find themselves unable to deal adequately with the major issues, because their time and energies are consumed by attempting to settle a myriad of almost individual disputes concerning whether employees are compensated fairly in relation to their peers and whether certain jobs are properly classified in relation to others. Moreover, the settlement of one issue is as likely to trigger additional disputes as it is to bring peace. Job relationship disputes involve not only compensation but social and peer prestige as well. If the multiple spindle grinder operator was being paid the same wage rate as the shaper operator, and then the latter's rate is raised, the former is likely to become quite upset. He is now lower rated in money and, from his perspective, perhaps in social standing as well. Without criteria upon which to rely, the union is forced to process a huge volume of grievances, and the company is faced both with potential labor disputes, or a constantly rising wage bill, or both. The results can be chaos, declining market share, lost jobs, or even business failure. The larger the facility, of course, the more difficult and expensive are the problems that arise.
>
> Clearly, it follows that strike incidence is certain to be higher if there is no coherent, mutually acceptable system.

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[29] Ibid.

[30] Ibid., p. 84–85.

[31] Ibid., p. 85.

[32] Ibid. (emphasis omitted).

[33] Ibid. Further, Schwab stated that "The firm's discretion in manipulating wages for key jobs is limited. Unless the external market is met, the firm will experience some difficulty in attracting and retaining a labor force." Ibid.

[34] Northrup paper, p. 94.

[35] *See generally* Jones & Laughlin Steel Corp. v. Nat'l Labor Relations Bd., 325 U.S. 886 (1936).

[36] Northrup paper, p. 94.

[37] Ibid.

[38] Sumner H. Slichter et al., *The Impact of Collective Bargaining on Management* (Washington, D.C.: Brookings Institution, 1960), p. 561.

> With individual wage disputes clogging the calendar, it can become politically impossible for union officials to agree to general settlement terms until such individual disputes are also resolved. From management's perspective, solution of such disputes without the criteria provided by a job evaluation system can result only in higher labor costs, still more disputes, and a continued upward spiral of the same. Consequently, management, literally to maintain the viability of the company, must stop giving. Unless the parties can agree to a reasoned system of job classification, the strikes that result can be long and bitter and the basic problem left unresolved.[39]

Job classification systems had became important to both labor and management, and by the 1950s, these systems had won wide acceptance in major corporations.

This did not mean that they were seen by either side as an unalloyed success:

> Disputes over the slotting of particular jobs usually vie[d] with questions of seniority and rights to overtime as the items that comprise[d] the largest share of the grievance load. This is what one would expect as changing product, technology, and methods alter job content. What job evaluation does. . .is to provide criteria for the settlement of these disputes and, by its existence and acceptance, preclude many other disputes from arising. This is its great contribution in collective bargaining.[40]

Methods of Job Evaluation

General Overview

Systems of job evaluation have come from a variety of sources. Management consulting firms have designed generic, "shelf" systems and have also custom-designed systems for specific firms or kinds of jobs.[41] In other instances, firms' personnel staffs have designed systems.[42] Often, committees with both management and employee representatives evaluate systems before they are put in operation.[43]

The purpose of all evaluation plans is to set forth "the relative position of jobs in the organization hierarchy based on job-related contributions agreed to by the parties."[44] It is generally acknowledged that job evaluation programs have eight basic goals.

1. To provide for a rational wage structure within an organization.
2. To provide an acceptable system for setting wage rates for new or changed jobs.
3. To provide a method for comparing wages within an organization.
4. To provide individual performance criteria.
5. To reduce wage and salary disputes and provide a structural method for resolving them.
6. To provide an incentive for employees to improve their job skills and productivity.
7. To provide facts for wage negotiation (primarily, if not exclusively, within unionized companies).
8. To provide data for the selection, training, promotion and transfer of employees.[45]

Jobs are evaluated on various factors: the years of formal education required; the technical or management skills necessary;[46] the degree of independent judgment the position requires;[47] the degree of supervision by others;[48] the number of employees supervised;[49] the physical and emotional stress inherent in the position; the importance of the work performed to the organization; and the economic effect that the failure to perform that job properly would have (i.e., how much money the firm would lose if the incumbent did not perform the job properly or made a serious error in judgment).[50] Professor Schwab notes that a number of advocates of comparable worth doctrine are increasingly defining comparability of work in terms of similar "[s]kill requirements, effort, responsibility, and working conditions. . . ."[51]

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[39] Northrup, "Wage Setting and Collective Bargaining," in *Comparable Worth: Issues and Alternatives*, ed. Robert Livernash (Washington, D.C.: Equal Employment Advisory Council, 1980), pp. 122–23.

[40] Ibid., p. 126.

[41] David W. Belcher, *Compensation Administration* (Englewood Cliffs, N.J.: Prentice Hall, 1974), p. 139 (hereafter cited as Belcher). *See also* Otis and Leukart, who cite similar overall goals common to all job evaluation systems, in *Job Evaluation* (Englewood Cliffs, N.J.: Prentice Hall, 1954), cited in Stanley Herman, "Let's Take Another Look at Position Classification," in *Personnel*, vol. 34 (November-December 1957).

[42] Bellak paper, p. 77. The use and evaluation of such systems is frequently one subject of negotiation between affected unions and a given employer.

[43] Ibid., p. 78. Some experts, such as Professor Donald Schwab, have indicated that job evaluation plans are not widely used in the private sector: "[I]t is highly probable that the majority of firms do not use job evaluation, although it may be that a majority of private sector employees are covered by a job evaluation plan." Schwab paper, p. 90.

[44] Belcher, p. 139.

[45] Ibid., pp. 91–92.

[46] Northrup paper, p. 96; *see also* Schwab paper, p. 86; *see generally* Belcher, pp. 134–43.

[47] Belcher, pp. 138–43.

[48] Ibid.

[49] National Academy of Sciences Report on "Job Evaluation: An Analytical Review," 1983 (hereafter cited as NAS Study).

[50] Belcher, pp. 138–43.

There are two basic categories of job evaluation systems, quantitative and nonquantitative. Most systems fall into the quantitative category, which itself divides into two principal systems: the point method and the factor-comparison method.[52]

Quantitative Systems—The Point Method of Job Evaluation

The point method assigns a numerical score to each separate component of a job. A rating scale is then constructed for each component.[53] Chart 1 is excerpted from a typical point system.

Compensable factors, depending on the type of job—production, sales, administrative, etc.—might include:

- Education or training
- Experience
- Verbal skill
- Technical skill
- Responsibility for equipment
- Responsibility for operations
- Responsibility for the safety of others
- Mental effort
- Physical effort
- Surroundings (general working conditions)
- Hazards

These compensable factors are then broken down into three or four subcomponents. For example, if working conditions are considered to be compensable factors, the so-called "degree" categories might range from "working in an air-conditioned office with an outside view" to "working in a small, unair-conditioned inside office" to "working in a noisy factory with continual exposure to toxic chemicals." If education is a factor, the degree categories might range from "being a high school graduate" to "2 or 3 years of college" to "having a Ph.D. in nuclear chemistry."[54]

Next the relative value of the compensable factors must be determined, answering such questions as: Will working conditions count twice as much as experience, the same, or half as much? These weightings can be arrived at by statistical techniques such as multiple regression analysis, or they can simply be decided by a management committee. The method used is not nearly as important as is the acceptance of the results by those affected.[55]

The evaluation is then done. The various criteria are rated, and appropriate point values are assigned for each job. The total number of points, chosen arbitrarily, is allocated on a percentage basis to each factor and degree.

The points assigned do not, of themselves, determine the wage rate. They serve only as a basis for comparing one job with another, as a general frame of reference facilitating the slotting or ranking of positions:[56]

> Often the initial choice of compensable factors and sample of key jobs will not result in an acceptably high (judgmentally determined) correspondence between wages and compensable factor scores. When this is the case, adjustments are made in compensable factors, in the sample of key jobs, or in yet other ways to improve the predictability of the wage criterion. The major point is that a number of judgmental adjustments are oftentimes necessary before the system provides "acceptable" results.[57]

Quantitative Systems—The Factor-Comparison Method of Job Evaluation

The factor-comparison method of job evaluation seeks to establish a rational relationship between the salaries paid to workers holding jobs for which the market economy has established a wage rate, and the salaries for those positions unique to a specific employer for which the market provides less guidance.[58]

This evaluation system is very complicated. It requires that the employer first ascertain which positions within the firm are "key" jobs, that is, a subset of those jobs for which the external market has established a known rate of pay. This method then analyzes and compares key and nonkey jobs on the basis of five compensable job factors common to all positions: mental requirements, physical require-

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[51] Schwab paper, p. 86.

[52] Belcher, p. 154.

[53] Ibid., p. 171.

[54] *See* Belcher, pp. 177–79.

[55] Ibid., pp. 179–81. *See* Bellak paper, pp. 77–78, where Dr. Bellak confirmed the accuracy of this belief.

[56] *See* Schwab, testimony, Consultation, vol. 2, p. 51 (hereafter cited as Schwab testimony).

[57] Schwab paper, p. 87. *See also* Bellak paper, pp. 76–77. As noted by the National Academy of Sciences in its report: "[T]here are no definitive tests of the fairness of the choice of compensable factors and the relative weights given to them. The process is inherently judgmental and its success in generating a wage structure that is deemed equitable depends on achieving a consensus about factors and their weights among employers and employees." NAS Study, p. 96.

[58] Belcher, p. 155; *see also* Schwab paper, p. 86.

CHART 1

TECHNICAL AND OFFICE JOBS

Element	*Total Points (Weight)*	*Per Cent*
Mental Demands	200	48.2%
Training and Experience	84	20.2%
Effect of Error	48	11.6%
Personal Contacts	45	10.8%
Job Conditions	38	9.2%

MENTAL DEMANDS

Mental Demands is the mental capacity required of an individual to perform a given job efficiently. Factors considered are judgment, analytical ability, initiative and originality. The training and experience acquired by an individual is not considered.

Degree		*Factor*	*Point Value*
1	(a)	Independent judgment in making decisions, from many diversified alternatives, that are subject to general review in final stages only.	200
	(b)	Analysis and solution of complex problems affecting production, sales, or company policy.	
	(c)	The establishment of procedures in a field in which pioneer work has been negligible and with no reference of detail to higher supervision.	
2	(a)	Independent judgment in making decisions from various alternatives, with general guidance only from higher supervision.	175
	(b)	Analysis and solution of nonroutine problems involving evaluation of a wide variety of data.	
	(c)	The establishment of procedures in conformance with administrative policies and general instructions from supervision.	
3	(a)	Independent judgment in making decisions involving nonroutine problems under general supervision.	150
	(b)	Analysis and evaluation of a variety of data pertaining to nonroutine problems for solution in conjunction with others.	
	(c)	The carrying out of nonroutine procedures, under constantly changing conditions, in conformance with general instructions from supervision.	
4	(a)	Independent judgment in planning sequence of operations and making minor decisions in a complex technical or professional field.	125
	(b)	Research and analysis of data pertaining to problems of a generally routine nature.	
	(c)	The carrying out of nonroutine procedures in conformance with instructions from supervision.	
5	(a)	Independent judgment in making minor decisions where alternatives are limited and standard policies have been established.	100
	(b)	Analysis of standardized data for information of, or use by, others.	
	(c)	Performance of semiroutine operations with guidance by supervision, but where detailed instructions are lacking.	
6	(a)	Independent judgment is negligible; however, minor decisions sometimes must be made. Work is checked by others.	75
	(b)	Analysis of noncomplicated data by established routine.	
	(c)	Performance of semiroutine operations from detailed instructions.	
7	(a)	Independent judgment is negligible but must be able to receive and transmit simple information obtained from written and verbal sources.	50
	(b)	Analysis of data is negligible but must be accurate in recording information for use by others.	
	(c)	Performance of routine, standardized operations under direct supervision.	
8	(a)	Independent judgment is not involved.	25
	(b)	Analysis not required.	
	(c)	Performance of simple, repetitive tasks under close supervision.	

David W. Belcher, *Compensation Administration* (Englewood Cliffs, N.J.: Prentice Hall, 1974), pp. 184–85.
Chart reprinted by permission of Prentice Hall, Inc., Englewood Cliffs, New Jersey.

ments, skill requirements, responsibility, and working conditions.[59]

Based on the results of the comparison, the salary levels for the key jobs and nonkey jobs can be assessed in relation to each other: Is the nonkey job's salary level an appropriate percentage of the key job's salary level, once overriding market conditions have been taken into account?[60] (The salary level of a nonkey job may be higher, lower, or even the same as the key job with which it is being compared.)

Nonquantitative Systems

Among the nonquantitative systems, the job ranking method is considered to be the least complicated job evaluation system and the least time consuming to implement.[61]

Job descriptions are drafted by the employer. The various jobs to be rated are then ranked. The usual procedure is to rank the jobs to be evaluated on a department-by-department basis. Professor David Belcher points out that rankings by department are necessary because "it is very difficult to compare directly shop (i.e., factory) jobs and clerical jobs," although if only a single compensable factor is used, some comparison may be possible.[62]

It is generally thought to be sound management to have several people do the ranking. The average rating is then used, thus reducing the likelihood that individual biases may color the process.[63] If more than one factor is to be taken into account, each position must be ranked for each factor and the scores averaged.[64]

Rather than specific lists of criteria, evaluators are given instructions to "keep the whole job in mind" during the ranking.

Another nonquantitative system is the job classification method. It is used by the United States Government, by many State and local governments,[65] and also by some businesses.[66]

In this system each job is slotted into a specific class or grade, and all jobs falling in the same class receive the same compensation. This is a five-step process.[67] First, an analysis of the position is done. Second, the jobs are classified by function, e.g., shop jobs, electrical engineering, supervisory, sales, and so forth. Third, management determines which components of the job are compensable and the importance of each to the employer's overall operations. Fourth, job and grade descriptions are developed. These set out the compensation level for each factor. Finally, each position is classified, and each job description is compared with the grade description to verify that it has been classified correctly.

General Observations About Job Evaluation Systems

Comparable worth doctrine calls for the mandated use of a bias free job evaluation system by each covered employer. With that in mind, two overriding facts about such systems must be considered. First, there is widespread disagreement among experts about the precise extent to which job evaluation systems are used by American industry. As Professor Schwab points out:

> [M]ost firms in the private sector probably do not use job evaluation. Frankly, the evidence here is very sketchy. . . .But it is highly probable that the majority of firms do not use job evaluation [systems], although it may be that a majority of private sector employees are covered by a job evaluation plan.[68]

Professor Schwab further noted that although "we know something about the specifics of how organizations implement job evaluation initially, we do not know very much about how they maintain those systems over time."[70] Professor Northrup told the Commission that "[m]y experience is most companies have informal [job evaluation] systems,"[71] as opposed to the formal systems discussed earlier in this chapter.

A large and diverse employer that does use job evaluations usually uses more than one method for its work force. Indeed, one practitioner states:

> We, ourselves, do not know of a single case, in all the years before and after the legislation of 1963 and 1964, where a large and diverse organization in the private

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[59] Belcher, p. 155; *See also* Schwab paper, p. 86.

[60] *See generally* Belcher, pp. 159–69 and 464–67; *see also* Schwab paper, p. 86; Northrup paper, pp. 94–96.

[61] Belcher, p. 146.

[62] Ibid., p. 147. The making of such comparisons is at the heart of the comparable worth controversy.

[63] Belcher, p. 148.

[64] Ibid., pp. 148–49.

[65] Ibid., p. 150. *See also* Schwab paper, p. 86.

[66] Belcher, p. 152.

[67] Ibid., pp. 151–52.

[68] Schwab paper, p. 90.

[70] Schwab testimony, p. 52.

[71] Northrup, testimony, Consultation, vol. 2, p. 54 (hereafter cited as Northrup testimony).

> sector concluded that a single job evaluation method, with the same compensable factors and weightings, was appropriate for its factory, office, professional, management, technical, and executive personnel in all profit center divisions and all staff departments. . . .
>
> In a large, diverse organization, where various segments of the total work force see themselves as substantially different from other segments, is it any wonder that several job evaluation methods are commonly employed? With multiple job evaluation methods, each with its own constituency, how does one establish the relative worth of jobs across segment lines for the organization as a whole?[72]

Moreover, there is no single, universally agreed-upon job evaluation system. This undoubtedly reflects the fact that no one can "prove the inherent validity of any method of job evaluation."[73]

The fact is that a degree of subjectivity is inherent in all these systems,[74] and classifications depend on the judgment of those doing the evaluating.[75] Different techniques, and different evaluators, may yield different values for the same job.

These differences often result from the different standards, values, and perceptions among job evaluators and among the firms or groups calling for evaluation. Results may well simply confirm preconceived values:

> There is no problem getting the results that you want from job evaluation. . . .The problem [with job evaluations] is to get results that are satisfactory when different groups want different results. . . .The issue. . .at the bottom is one of values. What should be the criterion for setting pay differentials? Should it be the external market or should it be internal job content related? Or should it be some other criterion? That value judgment is ultimately going to be decided by societal values.[76]

Furthermore:

> Job evaluation is not an *absolute* measurement process. Therefore, if job *X* has as many points as job *Y*, it is because thoughtful and disciplined application of a system using appropriate compensable factors has concluded that it does. If the Hay guide chart-profile method were the measurement instrument involved, we would be willing to go into a court of law and explain our process and explain why the evaluators concluded that job *X* had as many points as job *Y*. *But could we prove, to a legal certainty, that job X is inherently, absolutely, unequivocally worth as much as job Y? The answer is "No." We only could explain why, in the context of the organization and its value system, it was ranked the same.*[77]

As one expert has pointed out: "it is not possible to devise a system that would totally eliminate subjectivity in job evaluation programs, as no one can prove that one job is 'worth' more than another. Just as there is no such thing as a fair wage, but only opinions about what is fair, so there are only opinions about job worth."[78]

This is why agreement among all parties to an evaluation system is so important. Since voluntary job evaluation systems are aimed at achieving labor peace and assuring employees that they are being paid fairly, the success of any system depends on its acceptance by both management and employees.[79] One job evaluation practitioner has stated:

> [S]ince neither Hay nor anyone else can prove the inherent validity of any method of job evaluation, it is quite understandable that large organizations have selected multiple methods to be applied to the multiple segments. The resultant evaluations are, therefore, valid only to the extent that they are credible.
>
> Credible to whom? It is common for top management to impose a job evaluation method. They may "purchase" an established or custom-designed method from an external agent; they may have their own personnel staff apply an existing method or design one. *Whatever the case, the method is acceptable if it is credible to management and, directly or indirectly, to the employee body that is affected.*[80]

He added that:

> a job evaluation system can only function because people agree with the process and the result. . . .[A]s long as [the process] is voluntary, it's very useful. . . .[E]verything works fine until the law gets into it. In the private sector, where they have some sense of a voluntary job evaluation system, voluntary meaning the company says "Look, we'll do it this way if people go along with it," or the company and union agree, and then they both go along.[81]

Furthermore, he added:

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[72] Bellak paper, pp. 77–78. Professor Bellak did note that a single job evaluation method has been used across multiple segments of a large and diverse employer on many occasions and applied to every job in some small employers.

[73] Bellak paper, p. 77.

[74] *E.g.*, Northrup paper, pp. 96–97; Schwab paper, pp. 89–90 and Schwab testimony, p. 52.

[75] Ibid. Although there is little evidence on this matter, some experimental research does not support the view that evaluators were biased against jobs held predominantly by females. Schwab paper, pp. 89–90, citing studies by Arvey, Passino and Lounsbury, 1977; Grams and Schwab, 1983; and Schwab and Grams, 1984.

[76] Schwab testimony, p. 52.

[77] Bellak paper, p. 79 (emphasis partly in original).

[78] Northrup paper, p. 97.

[79] Ibid., pp. 95–96.

[80] Bellak paper, pp. 77–78 (emphasis added).

[81] Bellak, testimony, Consultation, vol. 2, p. 60.

> Once you interject the law, either by saying. . .that you must do certain things or allowing anybody to go to court anytime he or she doesn't like [the evaluation system's result], the whole thing will fall apart. It can only stay together by agreement. It's not like a physical scientist measuring something to a billionth of an inch. . . .Job evaluation hangs together only by agreement.[82]

Sex Discrimination

The most important thing determining wage and salary rates is the supply of, and demand for, the specific job skills or services in question. Job evaluation systems are chiefly useful in setting wage rates for those relatively few positions for which there is no external market rate[83] and in rationalizing the differences within a firm between related sets of job skills.[84] Job evaluation systems do not, of themselves, determine wage rates,[85] and systems are often revised to take changing market conditions into account.

No job evaluation system can prove that there is sex-based wage discrimination in a given firm or industry.[86] Professor Schwab stated that "[r]ecently, [comparable worth] advocates using what they refer to as comparable worth studies, but what are essentially job evaluation studies, have been very successful in finding sex-based [wage] discrimination. There is no problem getting the results that you want from job evaluation."[87] He went on to ask, rhetorically, whether job evaluation can identify discrimination. "The answer is, obviously, no. You can get anything you want out of job evaluation. The problem is to get results that are satisfactory when different groups want different results. That is the difficulty that we are confronted with in this comparable worth issue."[88]

Professor Northrup has written that:

> Job evaluation has been criticized both as a source of discrimination and as a method of determining whether discrimination exists. I suggest that its significance in both instances has been exaggerated.
>
> First, it should be emphasized that job evaluation's purpose is to "array jobs for the purposes of establishing wage differentials among jobs. It addresses the question of wage variability and hence the question of wage equity" [citing Schwab]. Job evaluation plans cover only a minority of employees, and most systems are informal. *Even where job evaluation is used, it does not account for all pay differentials.* Therefore, as Professor Schwab . . .noted, unless the law were to mandate the use of job evaluation, "modifications in job evaluation will not ensure that individual wage differentials conform to some criterion such as comparable worth."
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> * * *
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> *[J]ob evaluation and wage classification plans do not prove or disprove the existence of discrimination.*[89]

Dr. Bellak also testified extensively on precisely this point during the consultation. He told the Commissioners that:

> [I]f you use the technique that Willis used in the State of Washington or that Hay used in San Jose, and if you—you probably know that Willis used to work for Hay, and he has his own modification of our process—if you applied that process anytime in the last 30 years that we have had the process to a large organization, I think you would have found 30 years ago, today, and tomorrow that if you accept the compensable values reflected in the Hay guide chart profile method, and if you apply that method with professionalism and participation of the various representatives from the organization, that you will find that at the nonexempt levels in the factory and clerical kinds of jobs, that on the average women are paid less for the same points than men, if the job is dominated by one or the other.
>
> Now, does that prove that there is discrimination? Judge Tanner in the State of Washington says yes. All I can say is that there is a differential being paid. Now, is it because of discrimination which is possible, of course. Or is it because the people are drawn from different markets? The organization pays typists and secretaries and whatever in a market that's full of typists and secretaries, and it pays gardeners and electricians and whatever in a market that's full of gardeners and electricians, and that the markets are different.
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> * * *
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> It becomes inflammatory, you see, if you're talking about jobs predominantly filled with women versus men. *But I tell you that if you asked us the same question about accountants and engineers, we would give you the same result, that on average if we did go through the same process, same guide charts, same everything, that on the average you would find at the moment, and at the moment is important, that engineering points are worth more in the market than accounting points.*
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> Ten years ago or whenever, before the OPEC bubble burst, geologists, geophysicists, and so forth, petroleum

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[82] Ibid., p. 61.

[83] Schwab paper, p. 85.

[84] Ibid., pp. 86–89.

[85] Northrup paper, p. 96.

[86] *See generally* Schwab testimony, p. 52.

[87] Schwab testimony, p. 52.

[88] Ibid.

[89] Northrup paper, p. 96 (emphasis added) (citation omitted). Of course, job evaluations may employ discriminatory standards or be administered in a discriminatory manner.

> engineers, were like the rarest sapphires in terms of dollars per point. Now, tell me how many dozen you want and give me a dollar and I'll get them for you. You see, the market changed.
>
> Now, is that discrimination or is it simply the company or the State—and the States have done this forever, by the way, before comparable worth, simply buying, if that's not too offensive, buying talent at the price at which it's available in the market in which it finds itself. And it pays what it has to pay.[90]

Commissioner Ramirez then asked Dr. Bellak whether his studies of various corporate compensation policies showed that the market was the main influence on wages or whether there was a sex bias in operation.[91]

Dr. Bellak responded that:

> You asked me what I believe. I am willing to believe that there is some amount of pay discrimination in the market. If you asked me to prove it, I'd tell you I can't, and I frankly don't think the economists this morning can either. I think they can prove a differential, and they, it seems, as best I understood them, conclude that all the variance that they cannot explain must, therefore, be the result of discrimination.
>
> *To my eye, what they end up with is unexplained variance. They don't know what it's attributable to, and neither do I.*[92]

Dr. Bellak pointed out:

> [T]he advocates [of comparable worth] raise the issue of simple fairness. For example, any thoughtful person would have to wonder about the fairness of the pay of college-trained nurses and librarians vs. the pay of semiskilled auto and steel workers (at least before the givebacks). *But the labor market is replete with this sort of thing—even where sex domination either does not exist or where it is clearly not a factor;* professors of physics and engineering vs. their recent former students working in Silicon Valley; highly skilled professional athletes vs. highly skilled surgeons; musicians in a professional symphony orchestra vs. master craftsmen; State Governors vs. company presidents; the president of a division of American Express vs. the chairman and chief executive officer of American Express itself (at least true for 1983); successful female models, age 15 to 20, vs. almost any other successful person of comparable age with comparable skill, effort, and responsibility. The list is endless.
>
> None of this is to suggest that we see nothing that looks like discrimination in the labor market, because we do. None of this is to suggest that we see the labor market as being entirely free, because it is not. We are concerned that, in our haste to address the issue of fair pay for women, laws are being passed that may open a Pandora's box of serious new problems—before we have had time to analyze thoroughly and think through the probable and potential consequences of our actions.[93]

Implementing Comparable Worth

Proponents of comparable worth argue that "equitable wage differentials" should be the criterion for fairness. Yet no economist or other specialist has been able to say precisely what an "equitable wage differential" is. The principal difficulty, of course, is that there are no neutral, nonideological criteria of assessment; "justice" remains in the eye of the recipient.

Thus, one advocate of the comparable worth theory, after presenting a paper "focused largely on technical considerations in assessing wage discrimination and in correcting it through an evolving policy of comparable worth,"[94] has acknowledged that "comparable worth is less a technical than a political issue."[95] It is clear, whatever else its effect, that the adoption of a comparable worth standard would mandate a radical restructuring of wage-setting practices in the United States and would, in many cases, require the setting of wages by third parties who would not, in any reasonable sense, have to live with the results of their decisions.[96]

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[90] Bellak testimony, pp. 67–68.

[91] Ibid., p. 68.

[92] Ibid.

[93] Bellak paper, pp. 80–81 (emphasis added).

[94] Ronnie Steinberg, "Identifying Wage Discrimination and Implementing Pay Equity Adjustments," Consultation, vol. 1, p. 114 (hereafter cited as Steinberg paper).

[95] Ibid., pp. 114–15. This expert also stated that: "the considerable progress that has been made on comparable worth since 1977 demonstrates the power women and minorities are able to command when they organize and press for legal and political change." Ibid., p. 115.
"Moreover, what most women and minorities might have considered as a 'fair' relative wage even 20 years ago is now proving unacceptable to them. Fundamentally, comparable worth is an issue of fairness." Ibid., p. 115.
As a matter of bargaining between employer and employee, implementation of pay-setting practices along the lines of a comparable worth theory is far different from the use of such a theory as an antidiscrimination device, for as preceding chapters of this report have made clear, and as most commentators agree, there is no such thing as a fair wage, but only opinions as to what is fair. As another expert put it: "[T]here is no such thing as a fair wage. It's only a matter of opinion. Most people think they are underpaid. Most employers think they [employees] are being paid too much. And there is no objective criterion to determine who, if either, is correct." Northrup testimony, p. 53; *see also* ibid., p. 69. Thus, parties who must live with a pay arrangement may voluntarily agree to establish a comparable worth system and it is "valid" precisely, and only, because they have agreed to it. Using comparable worth as a matter of antidiscrimination law, however, seeks to coerce the use of job evaluations for a role they are not capable of playing.

Comparable worth advocates and their sympathizers are quite clear in the aims of their broad assault on current wage-setting practices, although they sometimes try to couch their assault in moderate terms, or with disclaimers.

Some comparable worth advocates claim that the market is infested with discrimination against women and, thus, that reliance on the market, at least as it currently operates, is unacceptable.[97] As one advocate explained it:

> Pay equity does not mean the *destruction* of an external, market-based, salary-setting scheme that will be replaced by a purely internal one. The goal of pay equity is to eliminate bias and discrimination in wage setting. *This bias may operate through market rates, through the way the employer responds to or relies on the market,* through biased job evaluation systems, or through purely subjective judgments made by employers. The objective of pay equity is not to overturn the market, but merely to eliminate bias, whatever its sources.
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> * * *
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> It would be virtually impossible for firms to establish wages with *no* reliance on the market, and pay equity activists have not asked employers to do so. They usually suggest that wages for predominantly male jobs be derived from prevailing market rates and be used as a baseline. Under this approach, wages for predominantly female jobs are raised to match those of similarly valued, predominantly male jobs. . . .
>
> [I]t is incorrect to characterize pay equity as *necessarily* a *full* substitute for or alternative to market-based wages. Pay equity requires a wage structure that is not consistently marred or dented by wage depressions that are tied to gender or race. On top of such an equitable structure, it is possible to *build in contingencies* that *permit* an employer to respond *legitimately* and *fairly* to *real* shortages, to seniority requirements, to employment needs of a labor pool. *But in its essence, the structure needs to be nondiscriminatory and, therefore, cannot be entirely market dependent.*[98]

Questions must be asked: Who or what builds in "contingencies that permit an employer to respond legitimately and fairly to the real shortages, to seniority requirements, to employment needs of a labor force"? Who or what will "permit" the employer to make the legitimate and fair response to "real" shortages (and, presumably, prohibit the employer from making illegitimate and unfair responses to "phony" shortages)? Who or what will determine if the alleged shortage is "real," and how will the determination be made? Once it is decided that the shortage is "real," who or what decides whether the employer's response is "legitimate" and "fair"—and how? As of now, the answer is: It is largely the labor market forces of supply and demand that make these determinations.[99] Moreover, labor markets change; i.e., supply and demand changes; the content of jobs themselves changes; and seniority is frequently a factor in compensation. Once a comparable worth pay plan is put into effect, job evaluations would have to be repeated over time as the employer's responses to these conditions alter the orginally "equitable" pay arrangement.

The advocates' denial that the implementation of comparable worth doctrine would amount to a radical reordering of our economic system, and their concession of a limited role for the market, rings hollow in the face of the obvious implications of their prescriptions. Those prescriptions will inevitably compel executive branch or judicial administration of wage setting.

Similarly, other experts have stated:

> The Comparable Worth strategy can be seen as an attempt to bring wages of female-dominated jobs up to the going market wage rates for similar type work that is not female dominated. Wages for female-dominated jobs are seen to be artificially depressed by discrimination. In this view it is not Comparable Worth that interferes with a free market, but discrimination. Given that there is discrimination in the labor market which depresses the wages of women's

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[96] Of course, some wage disputes are so resolved now. Their number, however, would skyrocket under comparable worth implementation.

[97] *See* Joy Ann Grune, "Pay Equity Is a Necessary Remedy for Wage Discrimination," Consultation, vol. 1, p. 169 (hereafter cited as Grune paper); Joint Hearings on Pay Equity before the Subcommittees on Human Resources, Civil Service, Compensation and Employee Benefits of the House of Representatives Committee on Post Office and Civil Service, 97th Cong. 2d Sess., Sept. 16, 1982, pp. 12–13 (remarks of Rep. Schroeder). *See also* Heidi Hartmann and Don Treiman, *Women, Work, and Wages: Equal Pay for Jobs of Equal Value* (National Academy of Sciences, 1981), p. 65.

[98] Grune paper, p. 169 (emphasis added).

[99] Professor Schwab also noted additional questions about "implementing job evaluation, and especially maintaining a system over time. What jobs will be included in the system? Will there be one or several systems? What sort of system(s) will be used? What types of compensable factors will be used? What jobs will be considered key jobs? What wages will be used to serve as the criterion?" Schwab paper, p. 89.

"The list of questions, and, hence, required judgments goes on and on. Moreover, answers to these questions are always tentative. Initially, they change based on the empirical results obtained as the system is implemented. Once implemented, they are subject to change as a function of the way internal and external criteria evolve over time." Ibid.

> jobs, intervention is necessary to remove discrimination and its effects. It is therefore unnecessary to have an alternative to market wages; it is necessary only to adjust them. A variety of mechanisms, particularly job evaluation systems, exist that can be used to adjust wages to remove the effects of discrimination.[100]

There are flaws in virtually every line of this point of view. The first sentence reflects a mistaken view of market wage setting; market factors largely affect wages for different jobs through supply and demand for the different jobs, not through a comparative job evaluation process, which sometimes is used as an aid in pay setting. The next sentence states, "Wages for female-dominated jobs are seen to be artificially depressed by discrimination."[101] If wages are artificially depressed because of discrimination, there are proper remedies: enforcement of the Equal Pay Act and Title VII's ban on wage discrimination.

The argument continues: "Given that there is discrimination in the labor market, which depresses the wages of women's jobs, intervention is necessary to remove discrimination and its effects."[102] In short, the government should intervene to ensure that each employer does not use sex as a factor in setting wages. But, by converting a general percentage pay gap between females and males into a *conclusive* determination of labor market discrimination while ignoring all of the nondiscriminatory factors accounting for the wage gap, and by claiming that any disparity between predominantly female and predominantly male jobs purportedly of comparable worth is sex discrimination within a firm, even though job evaluations have not been used and cannot be used to determine discrimination, comparable worth theory masquerades as antidiscrimination policy while serving as a means of fulfilling its advocates' political agenda.

Further: "It is. . .unnecessary to have an alternative to market wages; it is. . .necessary only to adjust them. A variety of mechanisms, particularly job evaluation systems, exist that can be used to adjust wages to remove the effects of discrimination."[103]

Again, who will ensure that "mechanisms" satisfactory to comparable worth advocates will be used to adjust wages? Enforcement of comparable worth theory must come from somewhere. If employers are to be compelled to disregard the labor market and to deploy job evaluation systems—particularly systems acceptable to comparable worth advocates[104] —and are then to be compelled to pay according to the results, then either courts or government bureaucrats will be overseeing and directing wage setting in this country to a degree unprecedented except during outright wage and price controls. This is a negation of the functioning of the labor market, and not just an "adjustment to a market-based wage system."

As another analyst has succinctly noted:

> [T]he labor market is the only device we have for sorting out many millions of workers with varying skills and interests among the multitude of different jobs in the economy. *Any attempt to do this by administrative methods, in addition to encroaching on personal liberty, would be hopelessly cumbersome and inefficient. Even communist countries. . .rely mainly on wage inducements in the market to secure a desirable allocation of the labor force.*[105]

Comparable worth doctrine and job evaluations alone simply cannot determine that one employee is worth more than another doing a different job, and they cannot do so either to a legal certainty. Moreover, views differ as to what constitutes a "bias-free" job classification system; aside from eliminating gender bias in the system itself, such a term merely means yielding "satisfactory" results to a given individual.

Some comparable worth advocates correctly note that government already intervenes in the marketplace to a certain extent:

> For the sake of employers, children, and adult workers, government has long intervened in the economy with legislation, Executive orders, appropriations, tax codes,

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[100] Grune paper, p. 169, citing Heidi Hartmann, "The Case for Comparable Worth," *Equal Pay for Unequal Work* (Eagle Forum Education and Legal Defense Fund, 1984), p. 11.

[101] Ibid.

[102] Ibid.

[103] Ibid.

[104] One observer predicts that:

> it won't be long before there is an additional challenge, as in "job D would have as many points as job E if the job evaluation system was appropriate for the kind of work performed by job D" (i.e., if it had "correct" compensable factors or the existing factors had "correct" weighting). What will the judges do with this allegation where the organization has a single job evaluation system applied to all jobs? Would the plaintiffs not be permitted to challenge the validity of the method used to measure the skill, effort, responsibility, and working conditions of their jobs? Could they not produce an army of experts to testify on their behalf?

Bellak paper, p. 79.

[105] L.G. Reynolds, *Labor Economics and Labor Relations* (Englewood Cliffs, N.J.: Prentice Hall, 7th ed., 1978), pp. 13–14.

etc. These steps are taken because of the belief that some principles take precedence over the right of a market to be free. Child labor laws, collective bargaining laws, antidiscrimination laws, health and safety laws, environmental laws, tax breaks, and targeted subsidies to ailing companies are examples of the belief in action.[106]

However, the scope and nature of this intervention pales when compared to the extensive intervention contemplated by comparable worth doctrine:

> Advocates of comparable worth see it as a way of raising women's economic status and, quite expectedly, tend to minimize costs. "Certainly, the costs incurred would vary widely depending on the scope of the approach chosen. But the economic costs of remedying overt discrimination should not prove staggering. Employers and business interests have a long history of protesting that fair treatment of workers will result in massive economic disruption. Similar claims were made preceding the abolishment of child labor and the establishment of the minimum wage, and none of the dire predictions came to pass."[107]

> Evidently the [supporters of comparable worth are] unaware of the numerous economic studies showing the disemployment effects of the minimum wage. However, what this statement fails to see is that comparable worth is in a bigger league than the child labor law or the minimum wage laws that have actually been implemented. It is far more radical. Instituting comparable worth by means of studies such as the one conducted in Washington State could be more like instituting a $15 an hour minimum wage or passing sweeping legislation like Prohibition. Moreover, the costs in terms of economic distortion would be much more profound than the dollars required to pay the bills. Curiously, this is recognized by one comparable worth proponent, who then suggests "that we give very serious consideration to the idea that firms that do raise pay for 'disadvantaged occupations' get special tax incentives for capital equipment that will raise the productivity of these workers. We can't expect firms to swallow these losses; that's crazy." Barrett is willing to go to these lengths because she thinks it might be a way to raise the incomes of poor women heading families on welfare. Long-term welfare recipients, however, are not the women holding the jobs covered by comparable worth schemes. The work participation of women in this situation is very low. Moreover, the lesson of studies of minimum wage effects has been that those who are most vulnerable to disemployment as a result of wage hikes that exceed national market rates are the disadvantaged—those with little education, poor training, and little work experience. Comparable worth would hurt, not help, these women. Subsidies to try to prevent these effects from occurring would be impractical to implement and prohibitively costly.[108]

Financial Costs and Effects on Firms

As to the actual dollar cost of implementing comparable worth doctrine, there is wide divergence of opinion. For example, Professor Ronnie Steinberg contends that settlement of the *AFSCME* v. *Washington State* case will ultimately cost the State about $325 million in backpay awards and an additional $75 million in annual payroll costs. The latter sum amounts to about a 5 percent increase.[109] Comparable worth advocates assert, however, that these kinds of costs can be avoided if only employers voluntarily take steps to implement comparable worth.

In 1982 the State of Minnesota enacted a comparable worth law covering all State employees.[110] The State's employee relations commissioner estimated that the State's payroll costs increased by 4 percent.[111]

Some other comparable worth advocates, however, have been unable to estimate what the economic burden of the doctrine's national implementation would be. For example, Joy Ann Grune, the former executive director of the National Committee on Pay Equity, has written that: "There are no sound estimates of the overall implementation costs of pay equity in the United States. . . .[S]o little is known about the cost of implementing pay equity [that] the National Committee on Pay Equity is surveying all employers who have begun implemention and all employers who have estimates of cost based on completed pay equity job evaluation studies."[112]

Moreover, Ms. Grune suggested that cost will vary workplace by workplace and that the experiences of both Minnesota and Washington may offer little evidence for the Nation as a whole: "[S]tatistics indicate that the greatest expense, on the average, will be in private firms, followed by the Federal government and then by State and local governments."[113]

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[106] Grune paper, p. 168. *See also* Winn Newman and Christine Owens, "Race- and Sex-Based Wage Discrimination Is Illegal," Consultation, vol. 1, p. 146.

[107] O'Neill paper, p. 184, quoting from a study conducted by the Center for Philosophy and Public Policy.

[108] O'Neill paper, pp. 184–85 (footnote omitted).

[109] Steinberg paper, p. 114. The initial $325 million backpay cost would be over 20 percent of the State government's total payroll. *See, e.g.*, Grune paper, p. 170.

[110] Nina Rothchild, "Overview of Pay Initiatives, 1974–1984," Consultation, vol. 1, p. 124.

[111] Ibid., p. 125. As a result of collective bargaining, 151 job classifications received pay equity increases. These pay raises were given to 8,225 State employees. Clerical workers received an additional $1,601 over a 2-year period and approximately half of the State health care workers received pay equity raises averaging $1,630 over that same period.

[112] Grune paper, p. 170. As of February 1985, this study had not been completed.

Other experts have conducted similar studies and have arrived at disturbing conclusions. Dr. Daniel Glasner of Hay Associates estimates that to rectify 80 percent of the pay gap (when the pay gap is based on a 60 percent ratio) would result in a $320 billion increase in higher wages and benefits for women. This would add nearly 10 percent to the existing inflation rate.[114] Professor Schwab has calculated that the annual cost in wages would be about $413 billion.[115]

There would be other costs as well. Professor Mark Killingsworth of Rutgers University has found that requiring wage increases for predominantly female, low-paying jobs would have a number of undesirable side effects. He uses a model in which job *A* is a predominantly female, low-wage job, and job *B* is a higher paying job held by both men and women:

> First, since the A wage rises, firms' demands for A workers will fall, leading to unemployment for some workers now in job A—who are disproportionately female. Second, the increase in the A wage raises labor costs and therefore prices; so consumers' demand falls. As consumers' demand falls, employer's output will contract, leading to decreases in the demand for job B (and, thus, to decreases in the demands for both male and female workers in job B). In turn, the decline in the demand for job B will lead to unemployment and/or lower wages for both men and women initially in job B.[116]

He concluded that, in the short run, the idea that raising wages in low-paid, predominantly female jobs "will help older cohorts of women who are locked into those jobs is at best half-true: such a policy would certainly benefit some of these women but, by reducing the total demand for such jobs, will necessarily harm the rest of them."[117]

He then posited a second assumption that, after these mandated wage increases took effect, the labor supply would eventually adjust itself in accordance with the changes:

> [I]n the long run as in the short run, the policy of raising pay for job A will also have several adverse side-effects. First, as in the short-run case, firms' demands for workers for job A will fall as the A wage rises. This will reduce employment of workers in job A, leading to unemployment for some individuals who would otherwise be in job A. (Since women are overrepresented in job A, this unemployment will hit women harder than men.) Second, the increase in the A wage relative to the wage for both men and women in job B attracts workers towards job A and away from job B. This reduces employment of both men and women in job B. In the absence of any restraint on the A wage, this increase in the supply of labor to job A would drive the A wage back to its original level. However, the comparable worth policy prevents the A wage from falling; instead, the increased supply to job A turns into more unemployment. Finally, since total employment in job A declines and employment of both men and women in job B also declines, production drops. The drop in production results in an increase in the price level.[118]

Professor Killingsworth's model is in line with the conclusions drawn by several other economists. For example, Professor George Hildebrand of Cornell University states:

> We already know enough about the consequences of the policy to be able to predict that it will increase unemployment still further, having the greatest effect on low-productivity workers. In fact, because of the cumulative consequences of discrimination in the past, many of those who are displaced will be women who are black or from other minority groups whose earnings already place them at the poverty line or near to it.[119]

Professor Hildebrand explained that implementation of comparable worth would likely increase unemployment in three particular ways:

> First, as with the mimimum wage it will raise the price of low-productivity workers without improving their productivity. In consequence, employers will be induced to

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[113] Ibid., p. 170.

[114] D.M. Glasner, "Pay Equity Viewed From An Economic Perspective," AAA, LMRS Conference on Comparable Worth, Washington, D.C., Jan. 23, 1984. As many comparable worth advocates acknowledge, however, the pay gap is not due entirely to discrimination. Thus, while the gross estimated cost is undoubtedly too high, other experts agree that such costs will be substantial. Schwab testimony, p. 52.

[115] Schwab testimony, p. 52.

[116] M. Killingsworth, "The Case For and Economic Consequences of Comparable Worth: Analytical, Empirical and Policy Questions" (paper prepared for a Seminar on Comparable Worth Research sponsored by the Commission on Behavioral and Social Sciences and Education, National Academy of Sciences-National Research Council, Hilton Head, S.C., Oct. 7-8, 1983), p. 20. *See also* testimony of Dr. Killingsworth at U.S. Congress, Joint Economic Committee, *Hearings on Women in the Workforce*, 98th Cong., 2d Sess., 1984, pp. 20–21.

[117] Ibid., p. 21.

[118] Ibid., p. 22 (footnote omitted).

[119] G.H. Hildebrand, "The Market System," in *Comparable Worth: Issues and Alternatives*, ed. E. Livernash (Washington, D.C.: Equal Employment Advisory Council, 1980), p. 105.

> lay part of the group off to hold down the enforced rise in their costs. Unlike the minimum wage, comparable worth would affect many more workers because it is intended to reach much further into the labor market. Second, for the low-paid women working in the numerous small or even tiny firms, the imposed rise in labor costs will bring about either much bankruptcy or voluntary closure. Disemployment of these workers will follow. Third, in larger firms the imposed increase in labor costs will create an incentive to substitute capital and to revise plant or shop organization to replace low-paid women or alternatively, to raise hiring standards so that fewer workers of either sex who are more productive can replace them.[130]

Similarly, another expert has noted that:

> It is also clear that the comparable worth theory would greatly raise the wage level. Jobs re-evaluated down—if any—by the comparable worth criteria would at most be red circled, with the attendant problems [of dissatisfaction over different pay for different work]. Jobs re-evaluated up would be raised. This would not only cause an increase in costs in itself, but would surely trigger demands from related groups who did not receive increases for upward adjustments or from union officials ready to whipsaw the wage system upward. In turn, this would mean not only additional costs but considerably more labor strife as managements and unions attempt to settle difficult problems without the benefits of agreed-upon job criteria or a jointly settled plan.
>
> Perhaps the most pernicious aspect of the comparable worth theory is that it would establish a government agency as the final arbiter of wages. The National War Labor Board of World War II found itself overburdened by individual wage disputes and gave job evaluation enormous impetus as a means of returning the task to the parties, who the Board's public, industry, and labor members believed were best qualified to handle it. The wisdom of the WLB's policies has become apparent, because job evaluation as such is no longer a contentious union-management issue. Moreover, experience has demonstrated that settlement by the parties of such issues is far better in terms of lasting results than determination by third parties. This is true even if the arbitrator is the clear choice of the parties because only the parties must live with and make work the determination that results.[131]

Professor Northrup told the Commission that if comparable worth were implemented, it might well:

> completely upset the labor relations system of the country. . . .[It] is an ill-defined concept which means many things to many people. . . .[T]he first thing I tell my students is [that] there is no such thing as a fair wage. It's only a matter of opinion. Most people think they are underpaid. Most employers think they [employees] are being paid too much. And there is no objective criterion to determine who, if either, is correct.[132]

He has stated that with comparable worth implementation:

> The task of wage determination. . .would go to civil rights agency officials and judges, neither of whom has demonstrated any expertise in this matter. This would be favorable for lawyers, but unhealthy for the country. The net effect would be to alter the industrial relations system, to increase labor strife, to raise labor costs, and to worsen America's already difficult position in international competition. . . .[133]

Further Observations

Given the controversial nature of the comparable worth concept, discussion will undoubtedly be distorted or misrepresented. Several key points should be reemphasized.

To recognize the crucial role that market forces of supply and demand play in wage setting is not to suggest that the market is, or should be, entirely free and unregulated. Nor is it to suggest that there is no sex discrimination in employment and wage setting. The point is that many nondiscriminatory factors, including labor supply and demand, and seniority and merit systems, are at work in setting wages. Accordingly, a purported *antidiscrimination* remedy that addresses the overall wage gap between men and women, or disparities in pay between predominantly female and predominantly male jobs, is inappropriate.[134]

The wage gap is, in large part, not a matter for antidiscrimination policy. To the extent that the pay gap results from nondiscriminatory factors—such as socialization within the family, women's aspirations, women's labor force participation cycles resulting from child rearing, or discrimination outside of the workplace such as what may or may not occur in education—an *employer* has violated no one's right to be paid without regard to his or her gender.[135]

Similarly, to the extent that market factors of supply and demand, seniority, and merit factors result in different pay for different jobs, an employer is not guilty of discrimination for relying on them. Job evaluation studies simply do not—and cannot—prove the existence of discrimination. They remain, when used by voluntary agreement, a useful tool in employer-employee relations. They are, however, necessarily subjective instruments; they cannot determine the intrinsic worth or value of a job.

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[130] Ibid., p. 106.

[131] Northrup, "Wage Setting and Collective Bargaining," in *Comparable Worth: Issues and Alternatives*, p. 133.

[132] Northrup testimony, p. 53.

[133] Northrup paper, p. 98.

[134] These factors are more fully discussed in chap. 2.

[135] Of course, sex discrimination in education should be remedied, but the remedy should be aimed at the entity that is discriminating.

When an employer does engage in wage discrimination, government enforcement of the Equal Pay Act and Title VII is called for. The use of a new, ill-conceived antidiscrimination remedy to address what is at bottom the wrong issue—i.e., wage disparities that are largely not the result of discrimination—will ultimately subvert the respectable name of civil rights for radical social and economic ends.

That the costs of comparable worth may be great is a *further,* and not a principal, reason to be wary. Some supporters of comparable worth like to suggest that those who raise this issue would condone discrimination because it is expensive to remedy.[126] This is a specious argument. The costs must be examined precisely because they would be imposed in the name of nondiscrimination and civil rights even as the comparable worth concept leaves discrimination against women in employment largely unaddressed. This would amount to money spent on a purported antidiscrimination remedy that, instead, serves the political, social, and economic objectives of its advocates.

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[126] Actually, it is ironic that supporters of comparable worth make the charge in any event: A number of civil rights laws, widely supported across the political spectrum, have more limited remedies. Title VII, for example, limits backpay awards to 2 years from the filing of an EEOC charge. 42 U.S.C. §2000e-5(g).

Chapter 4

Legal Issues

Statutory Bases

The Equal Pay Act[1] and Title VII of the Civil Rights Act of 1964[2] detail the two principal Federal statutory bases on which plaintiffs may make claims of sex-based wage discrimination. The Equal Pay Act applies *only* to sex-based wage discrimination; it specifically prohibits employers from paying unequal wages for "equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions."[3] Title VII, on the other hand, is broader in scope. It applies to employer discrimination based on race, color, religion, national origin, and sex with respect to several aspects of employment, including compensation. It makes it unlawful for employers to segregate or classify employees in any way that would adversely affect them because of sex or other specified reasons.[4]

The Equal Pay Act was signed into law in June 1963, a year before Title VII was passed. It was the culmination of years of effort in Congress.[5] The equal pay legislation first proposed by the Kennedy administration in 1962 required equal pay for "comparable," rather than equal, work.[6] Although both the House and the Senate substituted the word "equal" for "comparable,"[7] the two Houses were unable to reach final agreement on a bill that year. The administration, however, again proposed legislation to the 88th Congress, this time incorporating the equal work standard from the outset.[8] During a major debate in the House of Representatives, Representative Goodell, the sponsor of the bill eventually enacted as the Equal Pay Act, described what was meant by "equal work":

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[1] The Equal Pay Act provides, in relevant part:

> No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: *Provided*, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

29 U.S.C. §206(d)(1) (1982).

[2] Title VII of the Civil Rights Act of 1964 provides, in relevant part:

> It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. §2000e–2(a)(1), (2) (1982).

[3] 29 U.S.C. §206(d)(1) (1982).

[4] 42 U.S.C. §2000e–2(a)(1), (2) (1982).

[5] Beginning in 1945, legislation dealing with gender-based wage discrimination was unsuccessfully proposed in every Congress for the next 17 years. *See, e.g.*, S. 806, 81st Cong., 1st Sess., 95 Cong. Rec. 550 (1948); S. 1556, 80th Cong., 1st Sess., 93 Cong. Rec. 8085 (1947); S. 1178, 79th Cong., 1st Sess., 91 Cong. Rec. 6411 (1945). Each of these early proposals contained an equal pay for comparable work, rather than an equal pay for equal work, standard. *See* Golper, *The Current Legal Status of "Comparable Worth" in the Federal Courts*, 34 Lab. L.J. 563, 564 (1983) (hereafter cited as Golper).

[6] H.R. 11667, 87th Cong., 2d Sess., 108 Cong. Rec. 14,753–54 (1962) (Rep. Edith Green introduced the bill, which provided

> I think it is important that we have clear legislative history at this point. Last year when the House changed the word "comparable" to "equal" the clear intention was to narrow the whole concept. We went from "comparable" to "equal" meaning that the jobs involved should be virtually identical, that is, they would be very much alike or closely related to each other.
>
> We do not expect the Labor Department people to go into an establishment and attempt to rate jobs that are not equal. We do not want to hear the Department say, "Well, they amount to the same thing," and evaluate them so they come up to the same skill or point. We expect this to apply only to jobs that are substantially identical or equal.[9]

Other congressional proponents of the legislation said similar things,[10] and the bill containing the "equal work" language was enacted. As a result of its plain language and clear legislative history, the Equal Pay Act of 1963 has been construed to indicate that Congress did *not* intend the act to apply to cases of unequal pay for different, though comparable, jobs.[11]

Title VII was proposed as part of a comprehensive civil rights package sought by the Kennedy administration.[12] Title VII originally prohibited employment discrimination only on the basis of "race, color, religion, or national origin," making no mention of sex discrimination.[13] It was not until the floor debate was nearing an end that Representative Smith of Virginia proposed an amendment to add "sex."[14] The amendment was approved by the House,[15] but without any consideration of its relation to the Equal Pay Act.[16] In the Senate,

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that "[e]mployees must pay equal wages to employees doing comparable work the performance of which requires comparable skills").

[7] Representative St. George proposed this amendment to the House, explaining that "the word 'comparable'. . .gives tremendous latitude to whoever is to be arbitrator in these disputes." 108 Cong. Rec. 14,767 (1962). The Senate similarly adopted the "equal" work language. *See* H.R. 11677, 87th Cong., 2d Sess., 108 Cong. Rec. 22,082 (1962).

[8] H.R. 6060, 88th Cong., 1st Sess., 109 Cong. Rec. 9197 (1963).

[9] 109 Cong. Rec. 9197 (1963). Representative Goodell elaborated on this point, explaining that coverage would be based on job content and not job title, and would be limited to "jobs that involve the same quantity, the same size, the same number, where they do the same type of thing, with an identity to them" (remarks of Rep. Goodell in colloquy with Rep. Griffin). *Id.* at 9197–98. Recent judicial decisions require that jobs be "substantially equal" to fall within the protection of the act. *See, e.g.*, Corning Glass Works v. Brennan, 417 U.S. 188 (1974), *aff'g sub. nom.*, Hodgson v. Corning Glass Works, 474 F.2d 226 (2d Cir. 1973).

[10] *See, e.g.*, 109 Cong. Rec. 9195–96 (1963) (remarks of Rep. Frelinghuysen); S. Rep. No. 176, 88th Cong., 1st Sess. 1–2 (1963) (remarks of Sen. McNamara, stressing that the "equal work" requirement was a key element of S. 1409, the Senate version of the bill).

[11] *See, e.g.*, Angelo v. Bacharach Instrument Co., 555 F.2d 1164, 1173 (3rd Cir. 1977) (the intent of Congress in passing the Equal Pay Act was that it "not be invoked to mandate equality of pay for jobs of different content"). Commentators are virtually unanimous in their agreement that Congress clearly limited the Equal Pay Act to "equal work." *See, e.g.*, Gasaway, *Comparable Worth: A Post-Gunther Overview*, 69 Geo. L.J. 1123, 1132 (1981); Gitt and Gelb, *Beyond the Equal Pay Act: Expanding Wage Differential Protections Under Title VII*, 8 Loy. Chi. L.J. 723, 739 (1977) (hereafter cited as Gitt and Gelb); Golper at 566–67; Nelson, Opton, and Wilson, *Wage Discrimination and the "Comparable Worth" Theory in Perspective*, 13 U. Mich. J.L. Ref. 231, 265 (1980); Comment, *The Bennett Amendment—Title VII and Gender-Based Discrimination*, 68 Geo. L.J. 1169, 1172–73 (1980).

[12] Rep. Celler, Chairman of the House Judiciary Committee, introduced the administration's bill, H.R. 7152, on June 20, 1963. 109 Cong. Rec. 11,252 (1963).

[13] *See* H.R. Rep. No. 914, 88th Cong., 1st Sess. (1963), *reprinted in* 1964 U.S. Code Cong. & Ad. News 2391, 2401–08.

[14] 110 Cong. Rec. 2577 (1964).

[15] Representative Green presented the major opposition argument, stating: "It will clutter up the bill and it may later—very well—be used to help destroy this section of the bill by some of the very people who today support it." *Id.* at 2581. Other proponents of the bill also vigorously argued against the amendment. *See, e.g.*, *id.* at 2577 (Rep. Celler read a letter from the Department of Labor that stated the opposition of the Department's Women's Bureau to the amendment); *id.* at 2582 (Rep. Roosevelt's remarks).

Numerous other Representatives spoke in support of the amendment, asserting that the addition of a ban on employment discrimination on the basis of sex was necessary to remedy longstanding employment discrimination against women and to ensure that white women would not be left at a disadvantage vis-a-vis black women in the labor market (Title VII would protect the latter, of course, through its ban against race discrimination). *See, e.g.*, *id.* at 2583 (remarks of Reps. Tuten, Pool, Andrews, and Rivers); *id.* at 2580–81 (remarks of Rep. St. George); *id.* at 2582 (remarks of Rep. May); *id.* at 2584 (remarks of Rep. Gathings).

[16] *Id.* at 2804–05.

however, members expressed concern on this.[17] Apparently as a result of those concerns, Senator Bennett introduced an amendment to Title VII providing that:

> It shall not be an unlawful employment practice under this title for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions. . .of [the Equal Pay Act].[18]

The amendment, described by Senator Bennett as a "technical correction" to the bill "to provide that in the event of conflicts, the provisions of the Equal Pay Act shall not be nullified,"[19] was passed by the Senate and accepted by the House with very little debate.[20]

The language and scant legislative history of both Title VII's prohibition of sex discrimination and the Bennett amendment eventually gave rise to different interpretations: Did Congress intend to limit the scope of the title to claims of unequal pay for equal work? Or was broader coverage, possibly including claims involving different but comparable jobs, intended?[21]

Federal Case Law and Title VII

Early Cases

A number of courts of appeals considered this issue before the Supreme Court's 1981 ruling in *Gunther* v. *County of Washington.*[22] In one, *Christensen* v. *Iowa,*[23] female clerical workers at a State university claimed wage discrimination under Title VII. Their jobs, according to an evaluation conducted by the employer, were equivalent to those of higher paid male physical plant workers.[24] When the university modified its pay system as a result of the study, however, it provided higher starting wages only for physical plant workers.[25]

The Eighth Circuit, sidestepping the question of whether the Bennett amendment required Title VII claims to meet the "equal work" standard of the Equal Pay Act,[26] ruled that the plaintiffs failed to make a prima facie case that the wage differential "rested upon sex discrimination and not some other reason."[27] According to the court, the evidence indicated that the defendant paid plant workers higher wages "because wages for similar jobs in the local labor market were higher than the wages established under the [job evaluation study conducted by the defendant]"; Title VII does not require employers to ignore the market in setting wage rates.[28]

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[17] Senator Clark, a proponent of Title VII, sought to allay concerns expressed by some Senators with a memorandum that read in part:

> Objection. The sex antidiscrimination provisions of the bill duplicate the coverage of the Equal Pay Act of 1963. But more than this, they extend far beyond the scope and coverage of the Equal Pay Act. . . .
>
> Answer. The Equal Pay Act is a part of the wage hour law, with different coverage and with numerous exemptions unlike title VII. Furthermore, under title VII, jobs can no longer be classified as to sex, except where there is a rational basis for discrimination on the ground of bona fide occupational qualification. The standards in the Equal Pay Act for determining discrimination as to wages, of course, are applicable to the comparable situation under title II.

110 Cong. Rec. 7515.

[18] *Id.* at 13,647 (1964).

[19] *Id.*

[20] Senator Humphrey, floor manager of the bill in the Senate, simply stated that it was "fully acceptable." *Id.* Senator Dirksen explained that the Equal Pay Act, as an amendment to the Fair Labor Standards Act, contains "certain exceptions" and "[a]ll that the pending [Bennett] amendment does is recognize these exceptions. . . ." *Id.*

The only other explanation of the Bennett amendment made before the Civil Rights Act of 1964 became law was just before the House voted to accept the Senate version of the bill. Representative Celler stated that the amendment "[p]rovides that compliance with. . .[the Equal Pay Act] satisfies the requirement of [Title VII] barring discrimination because of sex. . . ." *Id.* at 15,896.

A year later, after enactment of the bill, Senator Bennett proposed an amendment to the Senate cloture rule. He believed the amendment necessary because during the Senate vote on Title VII, a number of amendments were offered and voted on with little or no discussion after cloture had been invoked. The result, he indicated, was scant legislative history as to the relationship of Title VII and the Equal Pay Act. As proof of the need for more extensive legislative history, Senator Bennett submitted for the record an excerpt from a law review article questioning the relationship between these two statutes. In response to the article, he also submitted for the record a brief that explained: "Simply stated, the amendment means that discrimination in compensation on account of sex does not violate Title VII unless it also violates the Equal Pay Act." 111 Cong. Rec. 13,359 (1965). Senator Dirksen supported Senator Bennett's explanation, stating that the Senate "had in mind precisely the point made by the Senator from Utah [Bennett] when the amendment was submitted. . . ." *Id.* at 13,360. Of course, postenactment legislative history is of less weight than preenactment legislative history in discerning the meaning of a statute. North Haven Bd. of Educ. v. Bell, 456 U.S. 512, 535 (1982) (citing Cannon v. University of Chicago, 441 U.S. 677, 687 n.7 (1979)). Moreover, Senator Bennett's remarks were not made in the context of consideration of an amendment to either the Equal Pay Act or Title VII.

[21] The issue of whether the Bennett amendment limited sex-based wage discrimination claims to the Equal Pay Act standard of equal work was resolved in 1981 by the Supreme Court. Gunther v. County of Wash., 452 U.S. 161 (1981). The Court held that Title VII wage discrimination claims are not limited to the equal work standard of the Equal Pay Act and that the amendment only authorized use of the Equal Pay Act's four affirmative defenses (the four exceptions listed in the act) in Title VII sex-based wage discrimination claims. *See* discussion of *Gunther* in this section, below.

[22] 452 U.S. 161 (1981). *See* note 21 above.

[23] 563 F.2d 353 (8th Cir. 1977).

[24] Under a job evaluation study known as the Hay system, which evaluated jobs in terms of 38 factors with "points" assigned for each factor, all female clerical workers at the university scored the same number of "points" and consequently were placed into the same labor grade as predominantly male physical plant workers. *Id.* at 354. Clerical workers also had seniority equivalent to physical plant workers. *Id.*

[25] *Id.*

A later decision by the U.S. Court of Appeals for the Tenth Circuit, in *Lemons* v. *City and County of Denver,*[29] held that the Bennett Amendment does limit Title VII claims to those involving equal work.[30] In *Lemons,* city-employed nurses alleged that Title VII was violated because nurses were "underpaid. . .in comparison with other and different jobs which they assert[ed]. . .[were] of equal worth to the employer."[31] The court also expressed, in general, its approval of the Eighth Circuit's position on market and community conditions.[32]

But in a contrary decision, the Third Circuit, in *IUE* v. *Westinghouse Electric Corporation,*[33] held that Title VII prohibits intentional discrimination even though the jobs held predominantly by women are *not* the same as those held predominantly by men.[34] The plaintiffs claimed that the employer deliberately set lower wages for female-held jobs than for male-held jobs that had received the same rating in the employer's own job evaluation.[35]

Other courts were in accord with the Third Circuit. One district court, in *Taylor* v. *Charley Brothers Co.,*[36] found that a pay disparity could not be justified on the basis of the existing difference in the contents of the jobs; a "substantial portion of the male-female [pay] differential can only be attributed to intentional sex discrimination."[37]

County of Washington v. *Gunther*

In June 1981 the Supreme Court moved to resolve these conflicts among the circuits.[38] In *County of Washington* v. *Gunther,*[39] by a 5–4 margin, the Court held that the Bennett amendment does not restrict Title VII to claims involving equal pay for equal work.[40] Rather, the Court concluded, the Bennett amendment merely authorizes wage "differentials attributable to the four affirmative defenses of the Equal Pay Act."[41]

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[26] *Id.* at 355.

[27] *Id.* Accordingly, the court said that it need not resolve the conflict over the Bennett amendment. *Id.* Judge Miller, concurring in the result because he concluded the Bennett amendment required proof of equal work, otherwise would have found that the clerical workers established a prima facie case based on the university's modification of the Hay system recommendations. *Id.* at 357.

[28] *Id.* at 356. The court characterized the plaintiff's claim as seeking to establish a prima facie violation of Title VII:

> whenever employees of different sexes receive disparate compensation for work of differing skills that may, subjectively, be of equal value to the employer, but does not command an equal price in the labor market. . . .[T]his theory ignores economic realities. The value of the job to the employer represents but one factor affecting wages. Other factors may include the supply of workers willing to do the job and the ability of the workers to band together to bargain collectively for higher wages. We find nothing in the text and history of Title VII suggesting that Congress intended to abrogate the laws of supply and demand or other economic principles that determine wage rates for various kinds of work. We do not interpret Title VII as requiring an employer to ignore the market in setting wage rates for genuinely different work classifications.

Id. (footnote omitted). *See* discussion of market defense to Title VII gender-wage discrimination claims at the end of this chapter.

[29] 620 F.2d 228 (10th Cir.), *cert. denied,* 449 U.S. 888 (1980).

[30] *Id.* at 229–30. *See also* Ammons v. Zia, 448 F.2d 117 (10th Cir. 1971) (Title VII wage discrimination plaintiffs must prove "equal work"). Of course, to the extent these pre-*Gunther* cases rely on the view that Title VII only prohibits gender-based wage discrimination prohibited by the Equal Pay Act, those portions of the rulings are of no weight today.

[31] *Id.* at 229. The nurses challenged the city's plan to pay city-employed nurses at the wage rate paid for nurses in the community. They sought, instead, to be compared to other city job categories. *Id.*

[32] *Id.*

[33] 631 F.2d 1094 (3d Cir. 1980), *cert. denied,* 452 U.S. 967 (1981). *See also* Fitzgerald v. Sirloin Stockade, 624 F.2d 945, *supplemental decision,* 680 F.2d 694 (10th Cir. 1980) (Title VII gender wage discrimination claim permitted even though the claim did not consist of an unequal pay for equal work charge); Gerlach v. Michigan Bell Tel. Co., 501 F. Supp. 1300, 1320 (E.D. Mich. 1980) (Title VII prohibits intentional wage discrimination on the basis of gender even in the absence of an equal pay claim).

[34] *Id.* at 1105, 1107–08. The court distinguished *Lemons* by noting that the trial court in that case found the city had not set the wages for females lower than wages for males because of their gender. *Id.* at 1107.

[35] The employer's 1939 manual admitted that the company maintained separate wage scales for men and women. *Id.* at 1097. Plaintiffs also contended that a new wage scale established in 1968 embodied and perpetuated the deliberately discriminatory policy of the prior plan. *Id.*

[36] 25 Fair Empl. Prac. Cas. (BNA) 602 (W.D. Pa. 1981).

[37] *Id.* at 611.

[38] *Compare Lemons,* 620 F.2d 228, *and Christensen,* 563 F.2d 353, *with IUE,* 631 F.2d 1094, *and* Gunther v. County of Wash., 602 F.2d 882 (9th Cir. 1979).

[39] 452 U.S. 161 (1981) (Brennan, J., delivered the majority opinion, in which White, Marshall, Blackmun, and Stevens, J.J., joined. Rehnquist, J., filed a dissenting opinion that was joined by Burger, C.J., and Stewart and Powell, J.J.).

[40] *Id.* at 171.

Gunther began in 1974. Four female guards in the female section of the Washington County Jail in Oregon filed suit against the county under Title VII,[42] alleging that they were paid unequal wages for work substantially equal to work performed by male guards.[43] In the alternative, they argued that some part of the pay differential was attributable to intentional sex discrimination, because the county set wages for female guards, but not for male guards, at a level lower than that recommended by its own job evaluation.[44]

The district court rejected the plaintiffs' first claim, finding that the male guards supervised 10 times as many prisoners as did female guards.[45] The court also found, as a matter of law, that Title VII claims must satisfy the equal work standard[46] and so dismissed plaintiffs' second allegation, that the difference in pay between male and female guards was a result of intentional discrimination.[47]

The court of appeals for the Ninth Circuit reversed the part of the decision about Title VII, holding that wage discrimination claimants "are not precluded from suing under Title VII to protest. . .discriminatory compensation practices" merely because the jobs they seek to compare are not equal by the standard of the Equal Pay Act.[48] The court remanded the case to the district court, instructing it to hear evidence on the plaintiffs' claim of intentional discrimination.[49] The appellate court noted, however, that in permitting such claims of intentional discrimination under Title VII, it was not adopting a "comparable" work standard: "attempts to establish a prima facie case based solely on a comparison of the work [a female] performs,. . .[must demonstrate] that her job requirements are substantially equal, not comparable, to that of a similarly situated male."[50] The appellate court added that: "because a comparable work standard cannot be substituted for an equal work standard, evidence of comparable work, although not necessarily irrelevant in proving discrimination under some alternative theory, will not alone be sufficient to establish a prima facie case."[51] The Supreme Court granted *certiorari* in 1980.[52]

The Supreme Court's opinion in *Gunther*, delivered by Justice Brennan and joined by Justices White, Marshall, Blackmun, and Stevens, defined the issue narrowly. The Court said: "The narrow question in this case is whether [a claim of intentional sex-based wage discrimination, supported by direct evidence] is precluded by the last sentence of §703(h) of Title VII, called the 'Bennett Amendment'."[53] The Court emphasized that it did not consider the case to be based "on the controversial concept of 'comparable worth'," which the Court referred to as: "compensation on the basis of a comparison of the intrinsic worth or difficulty of [a] job with that of other jobs in the same organization or community."[54] Rather, the Court characterized plaintiffs' claim as "[seeking] to prove, by direct evidence, that their wages were depressed because of intentional sex discrimination, consisting of setting the wage scale for female guards, but not for male guards, at a level lower than its own survey of outside markets indicate and the worth of the jobs warranted."[55] The Court concluded that such a claim is cognizable under Title VII, even though it does not rely upon an allegation of unequal pay for equal work.

The Brennan opinion first examined the language of the Bennett amendment and determined that the first part of the Equal Pay Act, containing the equal work standard, does not "authorize" anything because it is "purely prohibitory."[56] The Court found, however, that the second part of the act "'authorizes' employers to differentiate in pay on the basis of" any one of the Equal Pay Act's four affirmative defenses, and concluded it is to these defenses that the Bennett amendment refers.[57]

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[41] *Id.*

[42] *Id.* at 164. The plaintiffs did not sue under the Equal Pay Act because, at that time, the act did not apply to municipal employees. *Id.*

[43] *Id.*

[44] *Id.* at 164–65. The job evaluation study surveyed outside markets and the worth of jobs. *Id.* at 165.

[45] Gunther v. County of Wash., 20 Fair Empl. Prac. Cas. (BNA) 788, 791 (1976). The court of appeals affirmed that the jobs were not substantially equal, *Gunther*, 602 F.2d 882, 888 (9th Cir. 1979), and the plaintiffs did not seek Supreme Court review on this issue. County of Wash. v. Gunther, 452 U.S. at 165.

[46] *Gunther*, 20 Fair Empl. Prac. Cas. (BNA) at 791. The district court, therefore, made no findings and permitted no further evidence on whether there was intentional discrimination on the basis of gender. *Id. See Gunther*, 452 U.S. at 165.

[47] *Gunther*, 20 Fair Empl. Prac. Cas. (BNA) at 791. *See Gunther*, 452 U.S. at 165.

[48] *Gunther*, 602 F.2d at 891. The court of appeals upheld those portions of the district court's decision relating to plaintiffs' claims of retaliation by the employer.

[49] *Id.*, *supplemental decision on denial of rehearing*, 623 F.2d 1303, 1317 (9th Cir. 1979). *See Gunther*, 452 U.S. at 165–66.

[50] *Gunther*, *supplemental decision on denial of rehearing*, 623 F.2d at 1321.

[51] *Id.* A prima facie case is one legally sufficient to demonstrate a fact or prevail on the merits, unless rebutted by the defendant.

[52] 449 U.S. 950 (1980). The County of Washington petitioned for *certiorari*.

[53] *Gunther*, 452 U.S. at 166.

[54] *Id.*

[55] *Id.*

The Court found support for this reading of the Bennett amendment in the legislative history,[58] noting that legislative consideration of the relationship between Title VII and the Equal Pay Act did not take place until the 1964 civil rights bill reached the Senate floor.[59] The Court reviewed statements made by Senators Bennett,[60] Humphrey,[61] and Dirksen.[62] It concluded that although the remarks "do not explicitly confirm" the Court's reading of the purpose of the Bennett amendment, which it said was merely "to incorporate into Title VII the four affirmative defenses of the Equal Pay Act in sex-based wage discrimination cases, they are broadly consistent with such a reading, and do not support an alternative reading."[63] The Court also looked at the interpretations of the amendment by the Equal Employment Opportunity Commission, the agency charged with administering Title VII, but found that these interpretations were inconsistent and did not provide any guidance.[64]

The Court drew additional support from the broad remedial purposes of Title VII and the Equal Pay Act.[65] If the Bennett amendment meant that Title VII claims must satisfy the equal work standard, "a woman who is discriminatorily underpaid could obtain no relief. . .unless her employer also employed a man in an equal job in the same establishment, at a higher rate of pay."[66] The Court posed a hypothetical situation of a woman hired for a unique job where her employer admits a higher salary would have been paid to a male, and concluded: "Congress surely did not intend the Bennett Amendment to insulate such blatantly discriminatory practices from judicial redress under Title VII."[67]

In addition, it cited previous Supreme Court decisions that had interpreted Title VII broadly.[68]

Finally, the Court rejected arguments that its holding would make wage setting the subject of judicial review:

> Petitioners argue strenuously that the approach of the Court of Appeals places "the pay structure of virtually every employer and the entire economy. . .at risk and subject to scrutiny by the federal courts." They raise the specter that "Title VII plaintiffs could draw any type of comparison imaginable concerning job duties and pay between any job predominantly performed by women and any job predominantly performed by men." But whatever the merit of petitioners' arguments in other contexts, they are inapplicable here, for claims based on the type of job comparisons petitioners describe are manifestly different from respondents' claim. Respondents contend that the County of Washington evaluated the worth of their jobs; that the county determined that they should be paid approximately 95% as much as the male correctional officers; that it paid them only about 70% as much, while paying the male officers the full evaluated worth of their jobs; and that the failure of the county to pay respondents the full evaluated worth of their jobs can be proved to be attributable to intentional sex discrimination. Thus, respondents' suit does not require a court to make its own

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[56] *Id.* at 169. The Court interpreted the word "authorize" to mean "affirmative enabling action." *Id.*

[57] *Id.* The Equal Pay Act defenses are: (1) seniority, (2) merit, (3) quantity or quality of production, and (4) any other factor other than sex. 29 U.S.C. §206(d)(1) (1982).

[58] *Id.* at 169–176.

[59] *Id.* at 172.

[60] *Id.* at 173. (Sen. Bennett explained that his amendment was a "proper technical correction" to the bill and provided that "in the event of conflicts [between Title VII and the Equal Pay Act], the provisions of the Equal Pay Act shall not be nullified"). The Court said that Senator Bennett's emphasis on the "technical" nature of the amendment supports the view that only the affirmative defenses are incorporated into Title VII. *Id.* at 174–175. *See* above note 20 and accompanying text.

[61] *Gunther* at 174 (Sen. Humphrey described the amendment as "helpful" and "fully acceptable"). *See* above note 20 and accompanying text.

[62] *Gunther* at 174 (Sen. Dirksen stated that the amendment merely "recognize[s]" the "exceptions" of the Equal Pay Act). *See* above note 20 and accompanying text.

[63] *Gunther* at 176. The Court gave no weight to statements made by Senator Bennett and Senator Clark after passage of Title VII. *Id.* at 176 n.16. Also, the Court dismissed explanations of Title VII provided by Senator Clark in a memorandum printed in the Congressional Record before Title VII was amended by the Bennett amendment. *Id.* at 172 n.12. *See* note 17 above.

[64] *Gunther* at 177–78. EEOC's "1965 Guidelines on Discrimination Because of Sex" provided that the equal work standard applies to Title VII, but the agency did not follow the guidelines consistently. *Id.* at 177. The current guideline does not state what standard should be used, although the EEOC submitted an *amicus curiae* brief in *Gunther* arguing that the Bennett amendment does not impose an exclusive "equal work" standard on Title VII claims. *Id.* at 178.

[65] *Id.*

[66] *Id.*

[67] *Id.* at 179.

[68] *Id.* at 180. The Court cited Franks v. Bowman Trans. Co., 424 U.S. 747, 763 (1976) (Title VII prohibits "all practices in whatever form which create inequality in employment opportunity due to discrimination on the basis of. . .sex") and Los Angeles Dept. of Water & Power v. Manhart, 435 U.S. 702, 707 n.13 (1978) ("In forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes").

> subjective assessment of the value of the male and female guard jobs, or to attempt by statistical technique or other method to quantify the effect of sex discrimination on the wage rates.[69]

Although the *Gunther* majority took great care to indicate that the concept of comparable worth was not the basis for its ruling, the decision, by holding that Title VII claims need not be based upon an allegation of unequal pay for equal work, struck down the major legal barrier to the assertion of claims involving different but comparable jobs. The Court has now permitted claimants to bring suits alleging intentional sex discrimination in wages under Title VII, even if they do not allege unequal pay for equal work. Questions remain, however, about the exact contours of Title VII wage sex discrimination claims,[70] for example, whether proof of *intentional* discrimination is always necessary or whether a claim can prevail under a "disparate impact" standard; what elements are necessary to state a prima facie case, including the role of evidence of comparability of jobs;[71] how burdens of proof will be allocated in Title VII wage claims; what role market factors play in the establishment of a prima facie case; whether employers may avoid liability because of prevailing market wages;[72] and whether employer-conducted job evaluation studies are necessary to prove Title VII claims.[73]

The majority's admonition that *Gunther* did not endorse the concept of comparable worth is not to be overlooked. The plaintiffs' claim was not premised merely on the allegation of unequal pay for work of comparable value or on the assertion that their jobs were worth some percentage of the work of another job but were proportionately less well paying. Rather, plaintiffs asserted that (1) the employer *evaluated* the worth of their jobs, determined that they were worth 95 percent of the worth of a predominantly male job, paid the male employees 100 percent of the evaluated worth of their jobs, but only paid the plaintiffs 70 percent of the worth of the male job; *and* (2) "that the failure of the county to pay [plaintiffs] the full evaluated worth of their jobs can be proved to be attributable to intentional sex discrimination."[74]

After *Gunther*

Comparable Worth Per Se Claims Generally

A majority of courts, when faced with a per se claim of unequal pay for jobs or work of comparable worth or value to the employer, have rejected such a claim as a basis for Title VII relief.

Even before the *Gunther* decision, a number of courts had reacted with hostility to such Title VII comparable worth claims. In *Christensen* v. *State of Iowa*,[75] female clerical employees at the University of Northern Iowa (UNI) alleged that UNI was violating Title VII by paying exclusively female clerical workers less than was paid to predominantly male physical plant workers for jobs of equal value to the university.[76]

The court determined that it need not decide how the Bennett amendment affected Title VII litigation, because plaintiffs had failed to establish a prima facie case: "[Plaintiffs'] seek a construction of Title VII that may establish a *prima facie* violation of [Title VII] whenever employees of different sexes receive disparate compensation for work of differing skills that may, subjectively, be of equal value to the employer, but does not command an equal price in the labor market."[77] The court rejected this claim.[78]

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[69] *Id.* at 180–81 (footnote omitted).

[70] *See Gunther*, 452 U.S. at 181 ("We do not decide in this case the precise contours of lawsuits challenging sex discrimination in compensation under Title VII").

[71] *See Gunther* at 166, n.8 ("We are not called upon in this case to decide whether respondents have stated a prima facie case of sex discrimination under Title VII,. . .or to lay down standards for the further conduct of this litigation").

[72] In *Gunther*, the Court reserved opinion on this issue. *Gunther*, at 171 ("[W]e do not decide in this case how sex-based wage discrimination litigation under Title VII should be structured to accommodate the fourth affirmative defense of the Equal Pay Act. . . ."). *See also* Comment, *Comparable Worth Theory of Title VII Sex Discrimination in Compensation*, 47 Mo. L. Rev. 495, 512–14 (1982).

[73] Another issue left open by *Gunther* is whether the Equal Pay Act's single establishment rule is incorporated into Title VII by the Bennett amendment. *See* Bartelt v. Berlitz School of Languages of America, 698 F.2d 1003, 1007 (9th Cir.), *cert. denied*, 104 S.Ct. 277 (1983) (evidence of salaries of male employees at other Berlitz business establishments admissible to support Title VII sex-based wage discrimination claim).

[74] 456 U.S. at 180–81.

[75] 563 F.2d 353 (8th Cir. 1977).

[76] Prior to 1974, UNI determined wages for nonprofessional employees by reference to wages paid in the local labor market for similar jobs. The court noted that although all jobs were open to both sexes at UNI, the nonprofessional jobs tended to be segregated by sex. *Id.* at 354. In 1974, UNI installed a pay plan derived from a job evaluation study that put jobs with similar points in the same labor grade, even if the jobs were different. UNI set the pay range for each labor grade by reference to local market wages for similar jobs. "Because the local job market paid higher wages for physical plant jobs than the beginning pay under the system, [UNI] modified the proposed system to the extent of providing for advanced step starting pay for many of the physical plant employees, but not for beginning clerical employees. As a result, some physical plant employees, mostly male, continued to be paid more than clerical employees, all female, despite equivalent seniority and jobs in the same labor grade." *Id.* (footnote omitted).

In *Gerlach* v. *Michigan Bell Telephone Co.,*[79] plaintiffs, female engineering layout clerks, alleged, *inter alia,* that they were not being compensated for the "true value of their work to the employer on a comparable basis with men in the craft classifications."[80] The plaintiffs characterized their's as a comparable worth claim and abandoned an equal pay claim.[81] The court determined that the Bennett amendment did not limit Title VII sex-based wage discrimination claims only to those meeting the requirements of a claim under the Equal Pay Act, presaging the Supreme Court's ruling on this point in *Gunther.*

The court concluded, however, "that there is no independent cause of action based on a theory *solely* relating to comparable worth and under-valuation."[82] It went on to state: "Although comparable worth/under-valuation may be relevant evidence under a theory of discrimination, if proven, standing alone it will not establish a cause of action for sex-based wage discrimination."[83]

In *Gunther,* the U.S. Court of Appeals for the Ninth Circuit, while holding that a Title VII claim need not be limited to the equal pay for equal work standard, noted that:

> The effect of our decision will not be to substitute a "comparable" work standard for an "equal" work standard. Where a Title VII plaintiff, claiming wage discrimination, attempts to establish a prima facie case based solely on a comparison of the work she performs, she will have to show that her job requirements are substantially equal, not comparable, to that of a similarly situated male. The standards developed under the Equal Pay Act are relevant in this inquiry. In most cases, an equal work theory will provide the most practical method of establishing a prima facie case of wage discrimination. All we hold here is that a plaintiff is not precluded from establishing sex-based wage discrimination under some other theory compatible with Title VII. It is unnecessary to determine now what theories might be feasible. We do note that, because a comparable work standard cannot be substituted for an equal work standard, evidence of comparable work, although not necessarily irrelevant in proving discrimination under some alternative theory, will not alone be sufficient to establish a prima facie case.[84]

In *Wilkins* v. *University of Houston,*[85] the court rejected one claim, but ruled in favor of plaintiffs on another such claim. In so doing, it noted that its decision "bears no relation to the 'comparable worth' concept."[86]

In *Power* v. *Barry County,*[87] female prison matrons asserted that the employer underpaid them in comparison with corrections officers, who were all male, even though both jobs were of comparable and equal worth to the employer and required equal work. The court noted: "Although there are many definitions of comparable worth the quintessential element common to all is that discrimination exists when workers of one sex in one job category are paid less than workers of the other sex in another job category and both categories are performing work that is not the same in content, but is of the 'comparable worth' to the employer in terms of value and necessity."[88] The court concluded "that comparable worth is not a viable legal theory under Title VII. . . ."[89] The court acknowledged that an intentional wage discrimination claim after *Gunther* is cognizable under Title VII and may well mark the outer limits of Title VII coverage with respect to wages.[90]

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[77] *Id.* at 356.

[78] See discussion at the end of this chapter for the court's discussion of the role of the market in its determination.

[79] 501 F. Supp. 1300 (E.D. Mich. 1980).

[80] *Id.* at 1302.

[81] *Id.* at 1304.

[82] *Id.* at 1321 (emphasis in original).

[83] *Id.* The court noted:

> If Plaintiffs had alleged intentional discrimination or an alternative theory of wage discrimination distinct from comparable worth, the outcome of the case would not depend on an evaluation of the relative worth of any two jobs. Rather, the challenge would be to the use of a wage structure that is built on the alleged intent that a job that is performed by women should be compensated at a reduced rate. It would then be the legality of this *system* that would be at issue.

Id. at 1321 (emphasis in original).
The court also asserted that neither the appellate court's decision in *Gunther* nor the decision in IUE v. Westinghouse Electric Corporation, 631 F.2d 1094 (3d. Cir. 1980) supports the proposition that a comparable worth or undervaluation claim per se states a Title VII cause of action. *Id.* at 1320. In *IUE,* the court of appeals for the Third Circuit determined that the Bennett amendment does not preclude a Title VII cause of action of intentional wage discrimination even in the absence of an equal pay for equal work claim. It did not rest on a comparable worth theory, but remanded the case to the district court for further proceedings. 631 F.2d at 1096–97, 1107–08 and 1108 n.20.

[84] 623 F.2d at 1321. The court recently reiterated this view in Spaulding v. Univ. of Washington, 740 F.2d at 700–701.

[85] 654 F.2d 388 (5th Cir. 1981), *vacated and remanded,* 459 U.S. 809, *aff'd on remand,* 695 F.2d 134 (1983).

[86] *Id.* at 405 n.26.

[87] 539 F. Supp. 721 (W.D. Mich. 1982).

[88] *Id.* at 722.

[89] *Id. Accord:* Conn. State Employees Assoc. v. Conn., 31 Empl. Prac. Dec. (CCH) §29,448 (D. Conn. 1983).

In *Penk* v. *Oregon State Board of Higher Education,*[91] a U.S. district court, citing the Ninth Circuit's decision in *Spaulding* v. *University of Washington,*[92] dismissed the plaintiffs' comparable worth claims for failure to state a prima facie case. The court said with reference to one such contention: "[Plaintiff] claims that teachers of Secretarial Science-Business Technology should be paid the same salary as teachers of Accounting, Physics, Psychology and Mathematics. There has been no showing that the positions in these disciplines require substantially the same skills, effort, and responsibilities. Without evidence of substantially equal job content, this issue is foreclosed by *Spaulding*. . . ."[93]

Most recently, in *American Nurses Association* v. *State of Illinois,*[94] a Federal district court dismissed a comparable worth claim as an invalid legal theory going "far beyond the existing statutory law, Supreme Court precedent, and the application of constitutional provisions."[95] Plaintiffs, the American Nurses' Association, the Illinois Nurses' Association, and 21 individuals employed by the State of Illinois, brought suit against the State, its Governor, and several State agencies and departments, charging them with sex-based wage discrimination under Title VII, the due process and equal protection clauses of the 14th amendment, and 42 U.S.C. sec. 1983.

The basis of the suit was a job evaluation study commissioned by the State of Illinois, but not implemented, which concluded that a pay disparity existed between State employees' jobs traditionally held by women and those held by men. The job evaluation ranked the "Nurse IV" job category first, assigning it 1,017 points.[96] But the study found that monthly salaries within this category averaged $2,104 while State-employed electricians, on the other hand, averaged $2,826 per month despite receiving only 548 points. This, plaintiffs argued, was evidence of discriminatory wage setting. Although plaintiffs conceded that the State had not implemented the study, they argued that because the job evaluation was funded by the State and conducted under the auspices of the Illinois Commission on the Status of Women, the State's failure to pay plaintiffs according to the results of the job evaluation was actionable. Furthermore, plaintiffs argued, the State's failure to implement the study supported a finding of unlawful discrimination.

In rejecting plaintiffs' comparable worth claim as contrary to Supreme Court precedent, the court cited *Gunther,* stating that: "the debate over whether Title VII requires equal pay for jobs of comparable worth has escalated dramatically as a result of the Ninth Circuit's historic decision. . .which the Supreme Court subsequently affirmed."[97] In *Gunther,* said the court, "the Supreme Court gave greater scope to claims of sexual discrimination in compensation under Title VII as compared to similar claims under the Equal Pay Act. The Equal Pay Act only requires equal pay for equal work. Title VII, on the other hand, by virtue of *Gunther,* imposes an unconditional obligation on employers not to discriminate in compensation on the basis of sex, regardless of whether the claim is based on allegations of equal work."[98] The trial court pointed out that the Supreme Court in *Gunther* stressed the narrowness of its holding, *stating explicitly in both the majority and dissenting opinions that the holding did not require judicial evaluation or imposition of a particular wage scale.*[99] Consequently, "*Gunther* does not stand for the proposition that Title VII prohibits disproportionately low pay in positions predominantly occupied by women. It establishes that Title VII categorically forbids discrimination in compensation on the basis of sex; what kind of evidence will suffice to support a claim of sex-based wage discrimination was not addressed by the *Gunther* court and constitutes the current legal controversy."[100]

The court also based its rejection of comparable worth on Congress' explicit rejection of the theory in the legislative history of the Equal Pay Act and Title VII: "The legislative history of the Equal Pay Act indicates that Congress carefully considered and specifically rejected a comparable worth standard when it enacted the Equal Pay Act. One year later, when debating Title VII, Congress neither explicitly nor implicitly reversed its earlier policy judgment."[101]

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[90] *Barry County,* 623 F.2d at 726. *Accord:* Conn. State Employees Assoc. v. Conn., 31 Empl. Prac. Dec. (CCH) §29,448 (D. Conn. 1983).

[91] Civil No. 80-436 FR, *slip op.* (D. Or. Feb. 13, 1985).

[92] 740 F.2d 686 (9th Cir. 1984).

[93] *Penk, slip op.* at 166.

[94] No. 84 C 4451, *slip op.* (N.D. Ill. Apr. 4, 1985).

[95] *Id.* at 15.

[96] This point value is taken from a table of job rankings that plaintiffs attached to the complaint. The table ranks 12 jobs traditionally held by women and 12 jobs traditionally held by men. Nurses employed by the State of Illinois were categorized as "Nurse IV" or "Nurse III." The "Nurse III" job category was awarded 893 points and was ranked second among the "women's jobs."

[97] *American Nurses* at 2–3.

[98] *Id.* at 3.

[99] *Id.* at 3, citing *Gunther,* 452 U.S. 161, 181–82 (1981) (emphasis added).

[100] *American Nurses,* at 3–4.

Of fundamental importance to the court was that the job evaluation study, although commissioned by the State, was not adopted:

> [*M*]*ere funding and performance of such a study do not commit an employer to adopting the results of the study. Nothing in the law obligates an employer to adopt a new pay structure simply because a particular evaluative study indicates that a different set of pay relationships would be more equitable.* Such a rule would create a disincentive to employers to conduct job evaluation studies at all. What the law does require is equal application of any particular wage scale an employer does adopt. . . .Although plaintiffs claim that this suit, like *Gunther*, does not require a court to make its own subjective assessment of the value of the jobs in question, plaintiffs do, in effect, request the court to impose a particular wage scale on an employer. This court declines to assume such supervisory power.[102]

"Job evaluations," the court noted further:

> can be a useful diagnostic tool, but *the law does not require an employer to implement immediately whatever pay changes a particular study suggests, without regard to economic considerations, the labor market, bargaining demands or the possibility that some other study might produce different results. . . .*[103] Nothing in [Title VII] indicates that the employer's liability extends to conditions in the marketplace which it did not create. Nothing indicates that it is improper for an employer to pay the wage rates necessary to compete in the marketplace for qualified applicants.[104]

The court was equally unwilling to expand the limits of Title VII to encompass a comparable worth claim. To do so, said the court, would require that a court either evaluate the validity of the job evaluation system used by an employer and then impose a particular wage system on the employer or, in the absence of such a system, determine the relative worth of the job in question by a comparison of it to other jobs in the employer's establishment. "Such 'standardless supervision' by the courts is," said the court, "unauthorized and unwarranted."[105]

Some cases do endorse the comparable worth theory, and others seem to endorse it, but they represent a distinct minority of judicial opinion. In *Greenspan* v. *Automobile Club of Michigan*,[106] the court stated: ". . .Title VII appears to encompass claims of comparable work not being comparably rewarded which do not achieve the specificity or detail of an Equal Pay claim,"[107] citing the opinion of the court of appeals for the Ninth Circuit in *Gunther* before the Ninth Circuit court added its "Supplemental Opinion on Denial of Rehearing," which explicitly rejected a comparable worth per se theory under Title VII.[108]

In a post-*Gunther* case, *EEOC* v. *Hay Associates*,[109] the district court defined comparable worth as "an equal salary for comparable work, which is work that differed in content but was equally valuable to the work performed by men" in another job.[110] The court noted that "It is clear after the Supreme Court's decision in *Gunther* that such claims are cognizable under Title VII," also citing the *IUE* decision.[111] Further, in *Briggs* v. *City of Madison*,[112] the district court accepted the comparable worth theory as sufficient to establish a prima facie case of intentional wage discrimination.[113]

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[101] *Id.* at 4.

[102] *Id.* at 9 (emphasis added).

[103] *Id.* at 10 (emphasis added).

[104] *Id.*, citing Briggs v. City of Madison, 536 F. Supp. 435, 443 (W.D. Wis. 1982).

[105] *American Nurses*, at 11, citing Spaulding v. Univ. of Wash., 740 F.2d 686, 701 (9th Cir. 1984).

[106] 495 F. Supp. 1021 (E.D. Mich. 1980).

[107] *Id.* at 1043–44 n.23.

[108] *See* note 50 above. Another pre-*Gunther* case, Taylor v. Charley Bros. Co., 25 Fair Empl. Prac. Cas. (BNA) 602 (W.D. Pa. 1981), although essentially an intentional discrimination case relying in part on a great deal of evidence such as discrimination against women in areas other than wages, seems to embrace a comparable worth cause of action under Title VII. Among the facts and conclusions of law found by the court were these:

> When all the jobs in Department 2 are compared to all the jobs in Department 1, it is apparent that the total male-female differential of $1.70 (pre-1980) or $1.45 (post-1980) cannot be justified on the basis of the varying contents of the job.

Id. at 611.

> Defendant Charley Brothers' intention to discriminate against women in setting their wage rates lower than men may be inferred from the fact that it had not undertaken any evaluation which would have indicated the value of the jobs held by either men or women; from its pattern and practice of segregating women within a single department within the company; from its pattern and practice of only considering women job applicants for openings in that department; and from various discriminatory remarks made by company officials.

Id. at 614. However, the district court in Power v. Barry County, discussed above at text accompanying note 87, viewed the *Taylor* decision as one of intentional discrimination rather than as a case turning on the inequality of pay for jobs of comparable value, standing alone. 539 F. Supp. at 723.

[109] 545 F. Supp. 1064 (E.D. Pa. 1982).

[110] *Id.* at 1084–85 (footnote omitted).

[111] *Id.* at 1085. The Supreme Court, however, expressly noted that the plaintiffs' claim in *Gunther* "is not based on the controversial concept of 'comparable worth' under which plaintiffs might claim increased compensation on the basis of a

In *American Federation of State, County, and Municipal Employees* v. *State of Washington,*[114] the court referred to the employer's definition of comparable worth as the "provision of similar salaries for positions that require or impose similar responsibilities, judgments, knowledge, skills, and working conditions."[115] The court noted, "This is a case of first impression insofar as it concerns the implementation of a comparable worth compensation system."[116] The court asserted, however, that the case was "more accurately characterized as a straightforward 'failure to pay' case, remarkedly analogous to. . .*Gunther,*" rather than one resting on a comparable worth theory.[117] Nevertheless, it also said that the plaintiffs' claim challenged "the State of Washington's failure to rectify an acknowledged disparity in pay between predominately female and predominately male job classifications by compensating the predominately female job employees in accordance with their evaluated worth, as determined by the State."[118]

Although the court did rely on a variety of what it deemed to be additional evidence of disparate treatment and disparate impact in wages on the basis of sex violative of Title VII, the job evaluation results played a central role in the court's decision. This comparability was a major element in the court's finding that plaintiffs had established a prima facie case under both disparate treatment and disparate impact theories.[119] As in *Briggs*, the court would allow the employer to rebut both the prima facie case of illegal disparate impact (by producing evidence of "a legitimate and overriding business justification" for its pay scheme) and disparate treatment (by producing evidence of a legitimate, nondiscriminatory reason for the pay scheme).[120]

So it is that a majority of courts that have considered the issue have rejected the comparable worth theory, per se. Even some of those cases that accept its premises use it only as a basis for establishing a prima facie case of sex-based wage discrimination, and allow the employer to rebut such a case.[121]

Disparate Treatment and Disparate Impact

Under traditional Title VII analysis, plaintiffs alleging violations can prove liability under either of two theories: disparate treatment or disparate impact.[122] The disparate treatment theory requires plaintiffs to prove that the employer possessed a motive or intent to discriminate,[123] and this can be shown by circumstantial evidence.[124] Employers may rebut plaintiff's prima facie case with evidence of a legitimate, nondiscriminatory reason for the treatment.[125] Plaintiffs may still prevail, however, by demonstrating that the defendant's reasons are merely a pretext for discrimination.[126]

The disparate impact theory prohibits practices that have a discriminatory impact, regardless of whether the employer intended to discriminate. The

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comparison of the intrinsic worth or difficulty of their job with that of other jobs in the same organization or community." 452 U.S. at 166 (footnote omitted). Nor does the *IUE* case support a comparable worth theory per se as a cognizable basis for relief. *See* note 83 above.

[112] 536 F. Supp. 435 (W.D. Wis. 1982).

[113] The court, however, permitted the employer to rebut the prima facie case by showing its reliance on market factors. Thus, to the extent the comparable worth theory seeks to treat the pay disparity between predominantly female and predominantly male jobs of comparable worth or value to an employer as a recoverable claim, not merely a prima facie case subject to rebuttal, *Briggs* does not support that theory. A court's treating a comparable worth claim, however, as establishing a prima facie case, rather than merely as some evidence of a prima facie case under an intent (or disparate impact) theory, would be a legal inroad for comparable worth as a discrimination theory. For a description of this case, see text accompanying note 226, below.

[114] 578 F. Supp. 846 (W.D. Wash. 1983). The U.S. Court of Appeals for the Ninth Circuit heard oral arguments in this case on Apr. 4, 1985.

[115] *Id.* at 862.

[116] *Id.* at 865.

[117] *Id.*

[118] *Id.* (footnote omitted).

[119] *See, e.g.,* 578 F. Supp. at 860–64. Although the *AFSCME* case has received a great deal of publicity and is now on appeal to the court of appeals for the Ninth Circuit, it should be noted that it is one district court's opinion and seems to be at odds, at least in part, with a subsequent ruling of that appellate court. Spaulding v. Univ. of Wash., 740 F.2d 686 (9th Cir. 1984), *cert. denied,* 105 S.Ct. 511 (1984).

[120] 578 F. Supp. at 863. *See* note 113 above.

[121] Other cases, while not even finding a prima facie case of sex-based wage discrimination on the basis of a comparable worth theory, permit evidence of comparable worth between a predominantly female and a predominantly male job to be used as some evidence of such discrimination. *See, e.g.,* Gerlach v. Michigan Bell Tel. Co., 501 F. Supp. 1300 (E.D. Mich. 1980), discussed above at text accompanying note 79.

[122] The same set of facts may give rise to both a disparate treatment and a disparate impact claim. Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977).

[123] *Id.* at 335 n.15; *see also* Tex. Dept. of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981).

[124] *Burdine* at 253–54; *see also* Furnco Constr. Co. v. Waters, 438 U.S. 567, 577 (1978).

[125] *Burdine* at 254.

[126] *Id.* at 256.

plaintiffs must prove that a facially neutral employment practice causes such an impact.[127] The employer may respond by showing that the challenged business practice is "related to job performance" and has a "manifest relationship to the employment" or, in other words, is required because of "business necessity."[128] The plaintiffs may then rebut the defendant's explanation and prevail by showing that other business practices, with a less disparate impact, would serve the defendant's legitimate business interests.[129]

The Supreme Court, in *Gunther,* determined that a case of intentional sex discrimination in pay, i.e., one proceeding under the disparate treatment theory, may be heard under Title VII, even in the absence of an unequal pay for equal work claim.[130] The Court did not discuss whether the disparate *impact* theory might also be used to prove sex discrimination in wages, thus leaving this issue to lower Federal courts.[131]

Lower courts have, indeed, wrestled with this question. In *American Federation of State, County, and Municipal Employees* v. *State of Washington,*[132] the court ruled against the employer under both the disparate treatment theory and the disparate impact theory.

In *AFSCME,* the court relied, *inter alia,* on the employer's failure to pay employees in predominantly female jobs according to its own job evaluation study, in concluding that the employer had discriminated in wages against women under both the disparate treatment and disparate impact theories. The court noted that: "several comparable worth studies, since 1974, found a 20 percent disparity in salary between predominantly male and predominantly female jobs which require an equivalent or lesser composite of skill, effort, responsibility and working conditions as reflected by an equal number of job evaluation points. There is a significant inverse correlation between the percentage of women in a classification and the salary for that position."[133] The court also relied on the pay disparity, and considered circumstantial evidence and evidence of the employer's discrimination against women in employment dating to the 19th century, for its finding of discriminatory intent.[134]

As the *AFSCME* court noted, the disparate impact theory enunciated in *Griggs* v. *Duke Power Co.*[135] derived from an interpretation of section 703(a)(2) of Title VII.[136] The availability of a disparate impact theory under section 703(a)(1) of Title VII has not been decided by the Supreme Court. Section 703(a)(1) reads: "It shall be an unlawful employment practice for an employer. . .to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin. . . ."[137]

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[127] Griggs v. Duke Power Co., 401 U.S. 424, 430 (1971).

[128] *Id.* at 431–32.

[129] Albermarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975).

[130] 452 U.S. at 166.

[131] The Court in *Gunther* admitted that the incorporation of the Equal Pay Act's fourth affirmative defense (a factor other than sex) into Title VII "could have significant consequences for Title VII litigation." *Id.* at 170. The Court stated:

> Title VII's prohibition of discriminatory employment practices was intended to be broadly inclusive, proscribing "not only overt discrimination but also practices that are fair in form, but discriminatory in operation." Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971). The structure of Title VII litigation, including presumptions, burdens of proof, and defenses, has been designed to reflect this approach. The fourth affirmative defense of the Equal Pay Act, however, was designed differently, to confine the application of the Act to wage differentials attributable to sex discrimination. H.R. Rep. No. 309, 88th Cong., 1st Sess. 3 (1963). Equal Pay Act litigation, therefore, has been structured to permit employers to defend against charges of discrimination where their pay differentials are based on a bona fide use of "other factors other than sex." *Id.* (footnote omitted).

Some commentators interpret this language as a conclusive rejection of disparate impact wage claims. *See, e.g.,* Cox, *Equal Work, Comparable Worth and Disparate Treatment: An Argument for Narrowly Construing County of Washington* v. *Gunther,* 22 Duq. L. Rev. 65 (1983). *See also* Robert Williams, "Comparable Worth: Legal Perspectives and Precedents" (hereafter cited as Williams paper), in *Comparable Worth: Issue for the 80's* (a consultation of the U.S. Commission on Civil Rights, June 1984, Washington, D.C.) (hereafter cited as Consultation), vol. 1, p. 150.

Other commentators, however, point to *Gunther's* emphasis on the breadth and remedial nature of Title VII, *Gunther,* 452 U.S. at 178, and its explicit statement that it did "not decide. . .how sex-based wage discrimination litigation under Title VII should be structured to accommodate the fourth affirmative defense," *id.* at 171, and argue that the Supreme Court decision should *not* be read narrowly as rejecting disparate impact analysis. *See, e.g.,* Comment, *Sex-Based Wage Discrimination Under the Title VII Disparate Impact Doctrine,* 34 Stanford L. Rev. 1083 (1982). *See also* Winn Newman and Christine Owens, "Race- and Sex-Based Wage Discrimination is Illegal," Consultation, vol. 1, pp. 134, 140, 141 (hereafter cited as Newman paper).

[132] 578 F. Supp. 846 (W.D. Wash. 1983).

[133] *Id.* at 863.

[134] *Id.* at 860–63, 866 n.11.

[135] 401 U.S. 424 (1971).

[136] Section 703(a)(2) reads:

> (a) It shall be an unlawful employment practice for an employer—
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. §2000e–2(a)(2). *See* 578 F. Supp. at 857.

The *AFSCME* court noted that "[u]ntil recently, the availability of the disparate impact analysis in Section 703(a)(1) cases was unclear."[138] The court added, however, that the U.S. Court of Appeals for the Ninth Circuit had held that the use of disparate impact analysis under section 703(a)(1) was appropriate,[139] citing the Ninth Circuit's opinion in *Wambheim* v. *J.C. Penney*[140] and another opinion.[141]

The Ninth Circuit, however, significantly limited *Wambheim* and the availability of disparate impact analysis under section 703(a)(1) after the *AFSCME* decision. In *Spaulding* v. *University of Washington*,[142] the court held that disparate impact analysis is not available to Title VII plaintiffs making "wide-ranging claim[s] of wage disparity between only comparable jobs."[143]

The *Spaulding* case arose in 1974 when members of the faculty of a school of nursing[144] alleged that their university discriminated against them on the basis of sex in their compensation.[145]

The court noted that: "The nursing faculty's impact claim is simply stated: they have shown a disparate impact by showing a wage disparity between only comparable jobs and this disparate impact is caused by the facially neutral policy or practice of the University of setting wages according to market prices for jobs in the disciplines."[146] The court defined the issue as whether the disparate impact model is viable where plaintiffs "make a broad ranging sex-based claim of wage discrimination, based on comparable worth."[147]

The court held that disparate impact analysis was not available to plaintiffs making "wide-ranging claim[s] of wage disparity between only comparable jobs" and that a prima facie case could not be established by such an analysis.[148] The court noted that use of disparate impact analysis in that context would be an "extension of Title VII that would plunge us into uncharted and treacherous waters."[149]

The court cited two pre-*Gunther* cases, *Lemons* v. *City and County of Denver*[150] and *Christensen* v. *State of Iowa*,[151] and a post-*Gunther* district court case, *Power* v. *Barry County*,[152] as precedent. The court explained that "the [disparate impact] model was developed as a form of pretext analysis to handle specific employment practices not obviously job-related, such as: employers' intelligence tests which adversely affect minority persons, height and weight or other requirements [such as a policy requiring commencement of leave upon pregnancy] affecting those of a certain sex, or policies which exclude applicants based on arrest records."[153] The court cited *Pouncy* v. *Prudential Insurance Company of America*,[154] in which the Fifth Circuit stated: "The discriminatory impact model of proof. . .is not. . .the appropriate vehicle from which to launch a wide ranging attack on the cumulative effect of a company's employment practices."[155]

The court added:

> The nursing faculty unconvincingly cites cases for the proposition that "the disparate impact analysis has been applied to wage discrimination cases." They do not involve wide-ranging allegations challenging general wage policies but rather challenges to specific employer practices, namely, fringe benefits policies, with respect to which employers exercise judgment. The rules by which an employer determines the availability of fringe benefits can be evaluated in terms of their job-relatedness. It has been such "selection procedures to which the disparate

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[137] 42 U.S.C. §2000e-2(a)(1).

[138] 578 F. Supp. at 856.

[139] *Id.*

[140] 705 F.2d 1492, 1493–94 (9th Cir. 1983) (per curiam), *cert. denied*, 104 S.Ct. 3544 (1984). (Disparate impact analysis applied to employer's head-of-household rule, which allowed dependent insurance coverage under employer's medical plan only for employees who earned more than half of the family income.)

[141] Bonilla v. Oakland Scavenger Co., 697 F.2d 1297, 1302–04 (9th Cir. 1982), *cert. denied*, 104 S.Ct. 3533 (1984).

[142] 740 F.2d 686 (9th Cir. 1984), *cert. denied*, 105 S.Ct. 511 (1984).

[143] *Id.* at 706.

[144] The case was originally filed as a class action, but the class claims were dropped, leaving several named plaintiffs and intervenors. 740 F.2d at 693.

[145] *Id.* at 692.

[146] *Id.* at 705.

[147] *Id.*

[148] *Id.* at 706–07.

[149] *Id.* at 706.

[150] 620 F.2d 228 (10th Cir. 1980), *cert. denied*, 449 U.S. 888 (1980) (city-employed nurses failed to prove Title VII violation based on wage disparity between nurses and different jobs in community). *See* above text accompanying note 29.

[151] 563 F.2d 353 (8th Cir. 1977) (clerical workers failed to prove Title VII violation based on wage disparity between clerical and different male-dominated jobs at university). *See* above text accompanying note 75 for a discussion of this case.

[152] 539 F. Supp. 721 (W.D. Mich. 1982) (female jail matrons failed to prove Title VII violation based on wage disparity between jail matrons and male correction officers). *See* above text accompanying note 87 for a discussion of this case.

[153] *Spaulding*, 740 F.2d at 707 (citations omitted).

[154] 668 F.2d 795 (5th Cir. 1982).

[155] *Id.* at 800.

impact model has traditionally applied," *Pouncy*, 668 F.2d at 801, and not the mere payment of market wages.[156]

On these grounds, the court distinguished *Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans* v. *Norris*[157] and *Los Angeles Department of Water and Power* v. *Manhart*.[158] Both cases involved a fringe benefit policy. The court also distinguished its decision in *Wambheim* which:

> also involved a specific employer policy, and is not contrary to our holding here. *Wambheim*, a class action, narrowly held that "disparate impact analysis is appropriate in this §703(a)(1) case" where Wambheim and her class challenged Penney's "head-of-household" rule under its medical and dental insurance coverage, and that plaintiffs successfully established a prima facie case. 705 F.2d at 1494. That case we found "unusual" because it involved an allegation of violations under Section 703(a)(1): discrimination with respect to "compensation, terms, conditions, or privileges of employment," whereas the disparate impact theory had been developed in Section 703(a)(2) cases. However, *Wambheim* is inapposite here because it also specifically dealt with a particular employer policy rather than a full-scale assault on the employer's salary practices.
>
> We cannot manageably apply the impact model when the kernel of the plaintiff's theory is comparable worth. The problem is compounded in this case. When the disparate impact model is removed from the cases involving challenges to clearly delineated neutral policies of employers, it becomes so vague as to be inapplicable. *See Pouncy*, 668 F.2d at 801. The nursing faculty claims to have pinpointed a facially neutral policy at the University having the discriminatory impact they assert. That policy is the University's relying on the market to set their wages. We find that they have failed to do so, and emphasize that such a practice is not the sort of "policy" at which disparate impact analysis is aimed.
>
> Relying on competitive market prices does not qualify as a facially neutral policy or practice for the purposes of the disparate impact analysis that was first articulated in *Griggs*. For Title VII purposes, simply labelling an employer's action a "policy or practice" is not sufficient. What matters is the substance of the employer's acts and whether those neutral acts are a non-job-related pretext to shield an invidious judgment.
>
> Every employer constrained by market forces must consider market values in setting his labor costs. Naturally, market prices are inherently job-related, although the market may embody social judgments as to the worth of some jobs. Employers relying on the market are, to that extent, "price-takers." They deal with the market as a given, and do not meaningfully have a "policy" about it in the relevant Title VII sense. Fringe policies, which are discretionary, are altogether another matter. Additionally, allowing plaintiffs to establish reliance on the market as a facially neutral policy for Title VII purposes would subject employers to liability for pay disparities with respect to which they have not, in any meaningful sense, made an independent business judgment. As we have previously said, "Title VII does not ultimately focus on ideal social distributions of persons of various races and both sexes. Instead it is concerned with combatting culpable discrimination. In disparate impact cases, culpable discrimination takes the form of business decisions that have a discriminatory impact and are not justified by their job-relatedness." *Contreras* v. *City of Los Angeles*, 656 F.2d 1267, 1275 n.5 (9th Cir. 1981) (use of allegedly discriminatory auditor's examinations challenged).[159]

The court also rejected three other such superficially neutral policies asserted by plaintiffs as a basis for discriminatory impact analysis, finding that the first two had not been proved.[160] The third "facially neutral policy alleged is the University's 'discretionary budgeting policies based on subjective considerations.' We fail to see how this qualifies as a facially neutral policy, even if it were proved. Ordinarily, the lack of well-defined criteria as facilitating wage discrimination is a claim better presented under the disparate treatment model."[161]

The court noted that its holding in *Spaulding* is not to be construed as "making any broad statement as to the general availability of the impact model in other broad based sex-wage cases."[162]

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[156] *Spaulding*, 740 F.2d at 707.

[157] 103 S.Ct. 3492 (1983) (Title VII violation under disparate impact theory for employer to offer female employees benefit plan requiring them to make same contributions as male employees, yet that provided them with lower monthly benefits).

[158] 435 U.S. 702 (1978) (city requirement that female employees make larger contributions to pension fund than male employees for equal monthly benefits held to violate Title VII).

[159] 740 F.2d at 707–08.

[160] *Id.* at 708–09.

[161] *Id.* at 709 (citations omitted). *See also* Heagney v. Univ. of Washington, 642 F.2d 1157, 1163 (sex-based wage discrimination case in which court concluded that impact analysis is inappropriate where the gravamen of the complaint "is that the lack of well-defined employment criteria allowed a pattern or practice of discrimination to exit," and noting that although "[s]ubjective employment decisions may result in discrimination. . .the use of subjective criteria is not per se illegal"). *Cf.* Hung Ping Wang v. Hoffman, 694 F.2d 1146, 1148 (9th Cir. 1982) (for purposes of impact analysis, "the use of subjective criteria. . .is not enough of itself to violate Title VII").

[162] *Spaulding*, 740 F.2d. at 706.

A recent case that cited *Spaulding* in its discussion of the use of impact analysis is *American Nurses Association* v. *Illinois*.[163] The court ruled that: "relying on a factor such as competitive market prices does not qualify as a facially neutral policy or practice having discriminatory impact for the purposes of a disparate impact analysis."[164] "Rather," the court stated: "the disparate impact model was developed as a form of pretext analysis to handle specific employment practices not obviously job related, such as employers' intelligence tests which adversely affect minorities."[165]

A number of other courts have indicated that, in cases involving different jobs, only a disparate treatment claim of sex-based wage discrimination is cognizable under Title VII.[166] Different courts have evaluated wage claims under the disparate treatment theory without determining whether discriminatory impact analysis would also be available under Title VII.[167]

However, in addition to the *AFSCME* court, other courts *have* applied a disparate impact analysis.[168] There is little discussion in any of these cases, however, of the rationale for the use of such analysis. Prior to asserting that it would follow *Wambheim*, the *AFSCME* court noted, as a general proposition:

> The plain language and broad remedial policy behind Title VII should not be limited in the absence of a clear congressional directive. "As Congress itself has indicated, a 'broad approach' to the definition of equal employment opportunity is essential to overcoming and undoing the effect of discrimination. . . .We must therefore avoid interpretations of Title VII that deprive victims of discrimination of a remedy, without clear congressional mandate."[169]

In *Sobel* v. *Yeshiva University*,[170] female members of the university's medical faculty alleged sex-based wage, promotion, and other discrimination. The plaintiffs brought suit under a theory of disparate treatment, but during trial added a claim under a theory of disparate impact as well.[171] The district court concluded that the impact claim failed both on procedural grounds, by virtue of its having been introduced late in the proceedings, and on the merits, in that plaintiffs failed to prove a present violation within the relevant limitations period.[172]

More recently, in *Craik* v. *Minnesota State University Board*,[173] plaintiffs, female faculty members, brought suit under Title VII, 42 U.S.C. sec. 1983, and the 14th amendment alleging sex discrimination with respect to chair positions, rank, compensation, appointment to administrative positions, and sexual harassment. On appeal, the Eighth Circuit addressed one claim—market-factor pay increases—under a disparate impact theory and the remaining claims under a disparate treatment theory.

The court observed with regard to the impact claim that in 1980 the university began to distribute market-factor increases in five traditionally all-male disciplines identified as "scarce market areas": business administration, computer science, economics, engineering technology, and mathematics. Seventeen men and one woman received the awards. The woman was the only woman with a terminal degree in any of these five departments.

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[163] No. 84 C 4451, *slip. op.* (N.D. Ill. Apr. 4, 1985). *See* above text accompanying note 94 for a fuller discussion of this case.

[164] *Id.* at 13, citing Spaulding v. Univ. of Washington, 740 F.2d 686 (9th Cir. 1984), *cert. den.*, Nov. 26, 1984.

[165] *American Nurses*, at 13.

[166] *See* Power v. Barry County, 539 F. Supp. 721, 726 (W.D. Mich. 1982); Conn. State Employees Ass'n v. Conn., 31 Empl. Prac. Dec. (CCH) 29,448, 29,450 (D. Conn. 1983); Lanegan-Grimm v. Library Ass'n of Portland, 560 F. Supp. 486, 489 (D. Or. 1983) ("Title VII will reach disparities in compensation where the jobs do not involve equal work but where the disparities can be traced to intentional discrimination, although discriminatory intent is not a prerequisite to the success of all Title VII suits," citing as instances two cases, neither of which involved a claim of wage discrimination); EEOC v. Sambo's of Ga., Inc., 530 F. Supp. 86, 93 (N.D. Ga. 1981) *(dicta) (Gunther* "plainly indicates that the disparate impact doctrine. . .is. . .inapplicable in Title VII cases alleging wage discrimination on the basis of sex"). *Cf.* Plemer v. Parsons-Gilbane, 713 F.2d. 1127 (5th Cir. 1983) ("[We are persuaded] that the Court [in *Gunther*] was concerned with blatant cases of sex discrimination in which the only stumbling block to underpaid females' causes of action was the fact that the victimized women did not hold jobs similar to those held by men").

[167] Wilkins v. Univ. of Houston, 654 F.2d 388 (5th Cir. 1981) *vacated and remanded*, 459 U.S. 872 (1982), *aff'd on remand*, 695 F.2d 134 (5th Cir. 1983); Boyd v. Madison County Mut. Ins. Co., 653 F.2d 1173 (7th Cir. 1981) *cert. denied*, 454 U.S. 1146 (1982); Orahood v. Bd. of Trustees, 645 F.2d 651 (8th Cir. 1981); Grove v. Frostburg State Bank, 549 F. Supp. 922 (D. Md. 1982); Briggs v. City of Madison, 536 F. Supp. 435 (E.D. Wis. 1982); Greenspan v. Automobile Club of Mich., 495 F. Supp. 1021 (E.D. Mich. 1980).

[168] *E.g.*, Craik v. Minn. State Univ. Bd., 34 Fair Empl. Prac. Cas. (BNA) 649 (8th Cir. 1984) (applying disparate impact analysis to claim of discriminatory market-factor pay increases, but not to claim of overall salary discrimination or claim of discriminatory performance increases; apparently plaintiffs presented latter two claims under disparate treatment theory); Liberles v. County of Cook, 709 F.2d 1122 (7th Cir. 1983) (unequal pay for equal work with a *racially* disparate impact cognizable under Title VII); *see* Sobel v. Yeshiva Univ. 566 F. Supp. 1166 (S.D. N.Y. 1983). *See also* Segar v. Smith, 738 F.2d. 1249 (D.C. Cir. 1984) (claim of racial discrimination in, *inter alia*, salaries; rejects *Pouncy's* limitation on the use of disparate impact analysis).

[169] 578 F. Supp. at 856, citing *Gunther*, 452 U.S. at 178.

[170] 566 F. Supp. 1166 (S.D. N.Y. 1983).

[171] *Id.* at 1169, 1186–89.

[172] *Id.* at 1186–89.

[173] 34 Fair Empl. Prac. Cas. 649 (BNA) (8th Cir. 1984).

"The discriminatory impact of the awards is evident," said the court.[174] "[T]he one woman who received the award represented 6 percent of the recipients at the time when women constituted more than 20 percent of [the university's] faculty."[175]

The court, however, agreed with the university's argument that the awards were necessary to maintain a strong faculty in those disciplines, saying: "We cannot say that this. . .is clearly erroneous in view of the greater market demand for professionals in these disciplines than for professionals in disciplines such as English and Education, where women have traditionally specialized."[176]

In *Liberles* v. *County of Cook*,[177] the defendant objected to the court's application of a disparate impact analysis rather than the application of a disparate treatment standard to a claim of racial discrimination in the payment of unequal pay for *equal* work.[178] The court responded:

> Defendants offer no reason why this challenge to defendants' facially-neutral assignment and compensation policy should not be treated like any other Title VII challenge to a facially-neutral policy. It is rare, of course, that a plaintiff objecting to unequal pay for equal work can prove the existence of an employment policy with the statistically-requisite disparate impact. But the novelty of defendants' policy and its classwide effect is hardly a sufficient reason to conclude that disparate impact analysis is inappropriate.[179]

Along these lines, one expert who supports the application of both theories to sex-based wage discrimination claims states:

> The argument advanced of late by opponents of Title VII's prohibition of sex-based wage discrimination is to suggest that Title VII is limited to practices of intentional wage discrimination. It's just another way of saying that one particular type of discrimination—compensation—on one particular basis—sex—is entitled to a degree of deference and insulation from Title VII coverage that is not tolerated for any other form of discrimination. To paraphrase the Third Circuit in *IUE* v. *Westinghouse*, proponents of this intentional discrimination theory necessarily argue that Congress intended to permit employers to discriminate against women in a way in which it would not permit them to discriminate against blacks or whites, Jews or gentiles, Protestants or Catholics, Italians or Irish, or any other group protected by the act. The court concluded that no such intent could be ascribed to Congress, nor is there any real support for this radical proposition in case law. Indeed, such a proposition—that sex-based wage discrimination should be treated differently from other forms of discrimination claims—coming 20 years after the passage of the Civil Rights Act, must itself be viewed as a radical proposal and totally inconsistent with the law. Citing cases, as my opponents generally do, that arose prior to the issuance of the *Gunther* decision would appear to be totally irrelevant.[180]

Another expert, who opposes the use of disparate impact analysis, asserts that the Supreme Court in *Gunther*: "strongly intimated that the fourth affirmative defense may limit sex-based compensation claims to allegations of intentional discrimination. . . ."[181]

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[174] *Id.* at 661.

[175] *Id.*

[176] *Id.*

[177] 709 F.2d 1122 (7th Cir. 1983).

[178] Since the EPA applies only to sex-based wage differences, an unequal pay for equal work claim on racial grounds must be heard under Title VII.

[179] 709 F.2d at 1133.

[180] Winn Newman, testimony, Consultation, vol. 2, p. 88. This commentary is not necessarily an accurate description of the views of opponents of the application of a disparate impact analysis in compensation cases. First, many opponents of the use of such analysis are not "opponents" of Title VII's prohibition of sex-based wage discrimination. Second, although some opponents of the use of the disparate impact analysis in the pay area do single out that one term of employment so that only the disparate treatment theory is available, it is untrue that this would only apply on the basis of sex. That is, some opponents of the use of disparate impact analysis in the pay area for sex-based discrimination also oppose its use for race, national origin, or religion-based pay discrimination.

[181] Williams paper, p. 150. Mr. Williams cited the Court's discussion of the EPA's fourth affirmative defense and stated:

> The Court observed that the legislative history of the Equal Pay Act demonstrates that earlier versions of the Equal Pay Act were amended to define equal work and to add the fourth affirmative defense "because of a concern that bona fide job evaluation systems used by American businesses would otherwise be disrupted." The Court also stated that under the Equal Pay Act, courts and agencies are prohibited from substituting their judgment for the judgment of an employer who has adopted and applied a bona fide job rating system. Thus, although it was not required to resolve the issue, the Court strongly intimated that the fourth affirmative defense may limit sex-based compensation claims to allegations of intentional discrimination and that bona fide job evaluation systems may be considered to be a "factor other than sex."

Id. at 150 (citations omitted).

But see Newman testimony, pp. 88–89:

> In *Gunther* the Supreme Court made it emphatically clear that its decision was limited to determining whether Title VII wage claims were controlled by the equal work requirement of the EPA. The Court said "no" and beyond that expressly declined to rule on any other matter. . . .Thus, the Supreme Court decision in *Gunther* provides little or no support for the employer proposition

The *Spaulding* court expressed the better view on the proper standard to apply in these cases involving different jobs, i.e., that only claims of intentional wage discrimination should be cognizable under Title VII. Although the *Spaulding* court addressed only "wide-ranging claim[s] of wage disparity between only comparable jobs," we believe that this is sound policy in *all* wage claims involving different jobs.

As the *Spaulding* court and some other courts have noted, disparate impact analysis was developed under section 703(a)(2) for "specific employment practices not obviously job-related," such as height and weight requirements and particular kinds of tests.

In these analyses of disparate impact, an employer has a fair opportunity to offer evidence of his or her policy's legitimacy and job relatedness.

> [W]age differences that cross occupational lines seldom hinge upon the effects of such specific, identifiable procedures. On the contrary, job evaluation and job-pricing procedures are typically complex processes involving interrelated procedures, criteria, and judgments. So many different factors affect the setting of compensation levels for different job classifications that discrimination ordinarily cannot reasonably be inferred from the mere existence of wage differentials.

> [M]any of the factors that underline differences in compensation for different groups within the work force—e.g., market wage factors; differences in work patterns, career training, and worker preferences; differences in education, etc.—operate outside the immediate employment relationship and beyond the particular employer's knowledge and control. Hence, the use of an impact theory would be inappropriate, as it would place an unfair rebuttal burden on the employer.[162]

Indeed, given the roles of, among other things, market factors of supply and demand, informal and formal job evaluations, seniority and merit systems, and collective bargaining in the setting of wages, the isolation of the single practice that is responsible for a wage rate would be extremely difficult, if not impossible.

As the *Spaulding* court aptly noted, reliance "on the market" for wage setting "is not the sort of 'policy' at which disparate impact analysis is aimed."[163]

It is, thus, unpersuasive to assert that because disparate impact analysis is available in certain Title VII contexts, it must be available in *all* contexts. When the basis for application of disparate impact analysis is a specific employer policy such as a particular rule, test, height and weight requirement, etc., that is one thing. It is reasonable to conclude, however, that such analysis should not be extended to broad employer practices such as pay setting across different jobs. There it is ill suited to ferret out discrimination.

Burdens of Proof

The Supreme Court has explained, in detail worthy of reciting, the traditional Title VII standards of proof in a disparate treatment claim:

> First, the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant "to articulate some legitimate, nondiscriminatory reason for the employee's rejection." Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.
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> The nature of the burden that shifts to the defendant should be understood in light of the plaintiff's ultimate and intermediate burdens. The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff. . . .
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> . . .As the Court explained in *Furnco Construction Corp.* v. *Waters*, 438 U.S. 567, 577 (1978), the prima facie case "raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors." Establishment of the prima facie case in effect creates a presumption that the employer unlawfully discriminated against the employee. If the trier of fact believes the plaintiff's evidence, and if the employer is silent in the face of the presumption, the court must enter judgment for the plaintiff because no issue of fact remains in the case.
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> The burden that shifts to the defendant, therefore, is to rebut the presumption of discrimination by producing evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason. The defendant need not persuade the court that it was actually motivated by the proffered reasons. It is sufficient if the defendant's evidence raises a genuine issue of fact as

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that sex-based wage discrimination must be treated differently from other practices which are discriminatory both in purpose and/or effect. Reliance on *Gunther* for this proposition requires a distorted reading of the case and amounts to nothing more than sheer wishful speculation.

[162] Williams paper, p. 156.

[163] 740 F.2d at 708.

> to whether it discriminated against the plaintiff. To accomplish this, the defendant must clearly set forth, through the introduction of admissible evidence, the reasons for the plaintiff's rejection. The explanation provided must be legally sufficient to justify a judgment for the defendant. If the defendant carries this burden of production, the presumption raised by the prima facie case is rebutted, and the factual inquiry proceeds to a new level of specificity. Placing this burden of production on the defendant thus serves simultaneously to meet the plaintiff's prima facie case by presenting a legitimate reason for the action and to frame the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext. The sufficiency of the defendant's evidence should be evaluated by the extent to which it fulfills these functions.
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> The plaintiff retains the burden of persuasion. . . .[184]

But in an Equal Pay Act case (in contrast to Title VII intentional discrimination cases), the *defendant* must plead, and prove by a preponderance of the evidence, one of the four affirmative defenses available to employers under the act.[185] Thus, the burden of *persuasion*, and not merely the lesser burden of producing credible rebuttal evidence, falls on the employer.

In *Gunther*, as mentioned earlier, the Supreme Court ruled that the Bennett amendment did not limit Title VII claims to claims of unequal pay for equal work, but only incorporated the four affirmative defenses of the Equal Pay Act. Thus, another unresolved issue is how the incorporation of these defenses will affect traditional Title VII burdens of proof. Since the first three affirmative defenses—seniority, merit, and quantity or quality of production—are duplicative of exemptions already found in Title VII,[186] the issue becomes: "how sex-based wage discrimination litigation under Title VII should be structured to accommodate the fourth affirmative defense of the Equal Pay Act, [permitting employers to defend against charges of discrimination where their pay differentials are based on a bona fide use of 'other factors other than sex']."[187]

The Supreme Court in *Gunther* recognized that "incorporation of the fourth affirmative defense could have significant consequences for Title VII litigation."[188]

The precise issue is: Must an employer plead and *prove* that the bona fide use of a factor other than sex explains the pay difference, or merely produce credible rebuttal evidence, to meet the plaintiff's prima facie case (even if the employer does not actually prove that the "other factor" motivated his or her conduct)?

Lower courts have split on this issue. The U.S. Court of Appeals for the Ninth Circuit said, in *Gunther:* "The incorporation of the fourth affirmative defense into Title VII makes clear that once a Title VII plaintiff has shown that she was denied equal pay for equal work, the burden shifts upon the employer to *prove* that the differentiation was based on some factor other than sex."[189] The opinion did not make clear whether the employer under Title VII would retain the burden of persuasion if the claim did not involve equal pay for *equal* work. The court may have answered this in *Kouba* v. *Allstate Insurance Company.*[190] *Kouba* involved an equal pay for equal work claim under Title VII, but the court seemed to be speaking generally when it said: "Nothing in *Burdine* converts this affirmative defense, which the employer must plead and prove under *Corning Glass*, into an element of the cause of action, which the employee must show does not exist."[191]

The U.S. Court of Appeals for the Seventh Circuit, by contrast, has determined that traditional burdens of proof apply in an intentional sex-based wage discrimination case that does not allege unequal pay for *equal* work: "Once it is established that the Bennett Amendment and the Equal Pay Act standards do not govern plaintiff's claim, classic Title VII analysis must be applied to this case."[192] Relying on this decision, another court stated, referring to a disparate treatment claim that did not meet Equal Pay Act standards: "Plaintiff argues that in all Title VII disparate compensation actions, the defendant has the burden of proving one of the four Equal Pay Act exceptions to rebut a plaintiff's prima facie case. This is incorrect. Such a burden is imposed only if the plaintiff establishes that its claim meets the Equal Pay Act standards of substantially equal work."[193] Other courts have also used the *Burdine* standard.[194]

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[184] Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 252–56 (1981) (citations omitted) (footnotes omitted).

[185] Corning Glass Works v. Brennan, 417 U.S. 188, 196–97 (1974).

[186] Section 703(h) provides, in relevant part:

> Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production. . .provided that such differences are not the result of an intention to discriminate because of. . .sex. . . .

42 U.S.C. §2000e-2(h)(1984).

[187] *Gunther*, 452 U.S. at 171.

[188] *Id.* at 170.

[189] 623 F.2d at 1319 (emphasis supplied) (footnote omitted).

[190] 691 F.2d 873 (9th Cir. 1983).

[191] *Id.* at 875. *See also* Schulte v. Wilson Indus., Inc., 547 F.Supp. 324, 339–40 (D. Tex. 1982) (although the court may have limited its rejection of the *Burdine* standard of proof to cases of unequal pay for equal work).

So it is that the case law in this area provides little by way of analysis. The better view is to read the Equal Pay Act and Title VII harmoniously, recognizing both the unique protection against sex-based wage discrimination provided to workers under the Equal Pay Act and Title VII's carefully developed allocation of the burdens of proof in "intent" cases. Thus, in a claim alleging unequal pay for *equal* work under Title VII, an employer should be required to prove his or her nondiscriminatory explanation for the pay differential, as he or she must under the Equal Pay Act itself. For a Title VII wage discrimination claim alleging other than unequal pay for equal work, the usual *Burdine* Title VII allocation of burdens of proof should prevail.

There is no indication in its legislative history that Title VII's ban on sex discrimination was intended to lessen the Equal Pay Act's burden of proof for equal pay cases brought under Title VII. By the same token, there is no indication in Title VII's legislative history that Congress intended to include the Equal Pay Act's burdens of proof in Title VII wage cases outside the context of equal pay for *equal* work.

Elements of Proof

In *Gunther,* the Supreme Court explicitly refrained from deciding what elements must go into a prima facie case of discrimination in sex-based wage claims under Title VII.[195] The Court clearly indicated, however, that disparate treatment claims will pass muster when supported by "direct evidence, that [plaintiffs'] wages were depressed because of intentional sex discrimination, consisting of setting the wage scale for female guards, but not for male guards, at a level lower than [employer's] own survey of outside markets and the worth of the jobs warranted."[196]

Lower Federal courts have examined a variety of evidence in evaluating these claims, including statistical evidence, job evaluation results and testimony concerning comparability of jobs, and anecdotal evidence of discrimination. Some courts have considered a combination of these kinds of evidence.

In *Wilkins* v. *University of Houston,*[197] female plaintiffs alleged that their employer intentionally paid them less than men in both faculty and professional or administrative staff positions. Plaintiffs sought to prove, by statistical evidence, that the university acted with a discriminatory motive and engaged in a pattern of sex discrimination.

The U.S. Court of Appeals for the Fifth Circuit acknowledged that, in some cases, gross statistical disparities alone may establish a prima facie case of intentional discrimination:

> Because of the significant role that statistics can play in discrimination cases and of their inherently slippery nature, it is imperative that they be used properly. While gross statistical disparities may alone establish a prima facie case of employment discrimination in a proper case, the Supreme Court has cautioned "that statistics are not irrefutable; they come in infinite variety and, like any other kind of evidence, they may be rebutted. In short,

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[192] Boyd v. Madison County Mut. Ins. Co., 653 F.2d 1173, 1177–78 (7th Cir. 1981) (citing *Burdine), cert. denied,* 454 U.S. 1146 (1982).

[193] Lanegan-Grimm v. Library Ass'n of Portland, 560 F. Supp. 486, 490 n.1 (D. Or. 1983).

[194] Grove v. Frostburg Nat'l Bank, 549 F. Supp. 922, 938 (D. Md. 1982); Melani v. Bd. of Higher Ed., 31 Fair Empl. Prac. Cas. (BNA) 648, 657 (1983); Briggs v. City of Madison, 536 F. Supp. 435, 443, 446 and 446 n.10 (W.D. Wis. 1982); AFSCME v. Washington State, 578 F. Supp. 846, 857–59 (W.D. Wash. 1983) (also applied Title VII disparate impact standards in evaluating disparate impact claim). *See also* Orahood v. Arkansas Univ. Bd. of Trustees, 645 F.2d 651, 656–57 and 657 n.8 (8th Cir. 1981); Francoeur v. Corroon & Black Co., 552 F. Supp. 403, 408 (S.D. N.Y. 1982).

[195] The Court said:

> We are not called upon in this case to decide whether respondents have stated a prima facie case of sex discrimination under Title VII. . .or to lay down standards for the further conduct of this litigation. The sole issue we decide is whether respondents' failure to satisfy the equal work standard of the Equal Pay Act in itself precludes their proceeding under Title VII.

Gunther, 452 U.S. at 166 n.8. An earlier section discussed the viability of comparable worth per se claims.

[196] *Id.* at 166.

[197] 654 F.2d 388 (5th Cir. 1981), *vacated and remanded,* 459 U.S. 872 (1982), *aff'd on remand,* 695 F.2d 134 (5th Cir. 1983).

their usefulness depends on all of the surrounding facts and circumstances."[198]

The court noted:

> Plaintiffs' faculty compensation claim is based entirely on statistics. Through a series of analyses, plaintiffs established that with respect to the faculty: (1) men are paid more, on the average, than women; (2) with the college mean subtracted from each person's salary, men are still paid more than women; (3) considering only faculty members hired since 1972, the year Title VII became applicable to the University of Houston, men are paid more than women; (4) male assistant, associate and full professors are paid more than women of the same rank; (5) given the same length of service at the university, men are paid more than women; (6) men are paid more than women of the same age; and (7) within each college, men are paid more than women. These comparisons were intended to demonstrate that the differential between men's and women's salaries was not caused by any of the lawful, nondiscriminatory factors (e.g., rank, college, length of service, and age) that might result in men earning more than women. We find this evidence insufficient to do so.
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> *The fundamental flaw in plaintiffs' statistical evidence is that it fails to take into account the fact that a number of factors operate simultaneously to influence the amount of salary a faculty member receives.* It appears uncontroverted that the most important factor is the college in which a professor teaches—all other factors being equal, professors in colleges such as law and engineering are, because of market forces outside of the university, paid significantly more than professors in colleges such as humanities and social sciences. Accordingly, plaintiffs' statistical evidence showing that men and women of the same age, rank, or length of service are paid differently does not demonstrate discrimination because the college factor has not been considered. Similarly, plaintiffs' attempt to filter out the college factor is insufficient because the effect of the other factors—e.g., age, rank, and length of service, etc.—has not been considered simultaneously. Thus, if most of the women faculty members of a given college have been hired in recent years—as is likely to be the case given that women have become available for professorships in increasing numbers over recent years—we would expect that men within that college would be paid more than women because of higher rank and length of service. In short, a faculty person's salary is dependent upon a number of factors that operate simultaneously; plaintiffs' attempt to prove that sex was one of them must fail because of their failure to filter out the combined effect of the others.[199]

The court also rejected plaintiffs' reliance on the employer's statistical evidence concerning faculty pay.[200] Moreover, in addition to rejecting the faculty's pay claim, the court rejected the claim based on statistical evidence that most female professional and administrative staff were discriminated against.[201]

With respect, however, to the pay of a subset of the female professional and administrative staff, those in the employer's academic division, the court reversed the district court and directed that judgment be entered for the plaintiffs. The court analyzed the issue as follows:

> A portion of plaintiffs' evidence on this point was somewhat similar to the facts as alleged by the plaintiffs in *Gunther*. In 1975 the university formulated a pay plan for most of its professional and administrative staff employees. With the aid of an outside consulting firm, all of the jobs to be covered by the pay plan were evaluated and classified into one of nine levels, with the highest paying, most responsible jobs being those in level nine. Each level had a low and high figure associated with it representing the minimum and maximum pay a person whose job fell in that level should receive. The academic division of the professional and administrative staff employed some 68 persons when the pay plan was formulated—35 men and 33 women. Plaintiffs introduced evidence that, of those 68 persons, 21 were paid less than the minimum for the level in which their job fell, and that 18 of those 21 were women; according to plaintiffs' expert, a binomial distribution statistical analysis of this data demonstrates that this allocation of men and women among the 20 underpaid employees did not occur by chance. This showing is stregthened by evidence that all of the four employees in the academic division who were paid more than the maximum set for the job level of their position were men.
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> Furthermore, the jobs of five of the eighteen women who were paid less than the minimum for their job level and two of the women who were not paid less than the minimum were reclassified to a lower job level, while the jobs of none of the men in the academic division, including

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[198] 654 F.2d at 395 (citing Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 340 (1977) (footnote omitted)). The court also suggested that unless the statistics showed a gross disparity, other evidence would be necessary to show a pattern and practice of discrimination, at least in hiring. 654 F.2d at 408–10.

[199] *Id.* at 401–02 (footnotes omitted) (emphasis supplied). A number of other cases, in addition to *Wilkins*, acknowledge that statistical proof of wage discrimination claims may not be sufficient if it does not "take into account the fact that a number of factors operate simultaneously to influence" the pay of employees, such as job qualifications, seniority, or job category. *Id.* at 402. *See, e.g.*, Coble v. Hot Springs School Dist., 682 F.2d 721 (8th Cir. 1982); Valentino v. United States Postal Serv., 674 F.2d 56 (D.C. Cir. 1982); Payne v. Travenol Laboratories, Inc., 673 F.2d 798 (5th Cir.), *cert. denied*, 459 U.S. [illegible]038 (1982); EEOC v. Hartford Fire Ins. Co., 31 Fair Empl. Prac. Cas. 531 (BNA) (D. Conn. 1983); EEOC v. H.S. Camp & Sons, Inc., 542 F. Supp. 411 (M.D. Fla. 1982); and Vuyanich v. Republic Nat'l Bank of Dallas, 505 F. Supp. 224 (N.D. Tex. 1980), *vacated and remanded on other grounds*, 723 F.2d 1195 (5th Cir. 1984).

[200] Wilkins v. Univ. of Houston, 654 F.2d at 402–05.

[201] *Id.* at 405–06.

> the three who were underpaid, were similarly reclassified. The significance of this conduct of the university is demonstrated by the fact that Mr. Silber, the university official in charge of formulating the pay plan, testified that it would be inappropriate to reclassify into a lower job level the job of an employee who was being paid less than the minimum for the level in which his job was originally classified because the basis upon which a pay plan is formulated is an objective analysis of jobs, not individuals. If a goal of a pay plan is to obtain uniformity and equity in pay based upon a comparative analysis of the jobs covered by the plan, that goal clearly is frustrated by reclassifying an employee's job because the employee is being paid less than the minimum for the level in which his job originally was classified.[302]

In *Plemer* v. *Parsons-Gilbane*,[303] the same appellate court faced an individual claim of sex-based wage discrimination. The female plaintiff resigned from her position as an equal employment opportunity (EEO) representative when she was not promoted to the position of EEO officer. A man was selected for that job. When the woman resigned, her salary was $1,444 per month. The employer hired a man to replace her as EEO representative and paid him $1,542 per month, 6.8 percent more than the plaintiff's final salary. When that man resigned, a female employee was promoted to the job and paid $1,406 per month, 8.8 percent below her male predecessor's starting pay.[304] The court considered the unequal pay for equal work claim under the Equal Pay Act and Title VII, and considered a claim of intentional sex-based wage discrimination under Title VII.

With respect to the latter claim, the plaintiff asserted that her duties overlapped with her supervisor's and that the dissimilarities in the two jobs were not worth the salary disparity between the two jobs: "that although their duties are not equal, the ratio of Willis' duties [the male first selected to be EEO officer] to [plaintiff's duties] is out of sync with the ratio of his salary. . .to hers. . . .Because Willis' and [plaintiff's] duties are not sufficiently dissimilar in comparison to the differential in salary, [plaintiff] asserts, it should be found that the salary disparity was attributable to sex."[305]

The court rejected this claim:

> [Plaintiff] asks too much. She would have the courts make an essentially subjective assessment of the value of the differing duties and responsibilities of the positions of [plaintiff] and Willis and then determine whether [plaintiff] was paid less than the value of her position because [plaintiff] was female. If [plaintiff] had shown that the Company had placed those values on her and Willis' respective duties and responsibilities and were paying Willis the full value while paying [plaintiff] less than her evaluated worth, her claims could be considered. It is not the province of the courts, however, to value the relative worth of [plaintiff's] and Willis' differing duties and responsibilities, given the absence of either evidence of a kind similar to that delineated in *Wilkins*, or any direct or otherwise clear evidence as to how the Company valued the positions.[306]

In *Melani* v. *Board of Higher Education*,[307] a disparate treatment case, the plaintiffs' evidence consisted almost entirely of statistics. The district court relied on several statistical studies showing that female employees of the professional instructional staff of the employer earned approximately $1,600 to $1,800 less than males with the same productivity characteristics. The statistical technique yielding this result "sought to determine the average difference in salary for men and women while factoring out the effects of the independent variables studied."[308] The court concluded that the plaintiffs made out a prima facie case that the employer did not successfully rebut.

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[302] *Id.* at 406 (footnotes omitted).

[303] 713 F.2d 1127 (5th Cir. 1983).

[304] *Id.* at 1131.

[305] *Id.* at 1134.

[306] *Id.* Nor did the plaintiff show any "transparently sex-biased system for wage determination." *Id.* at 1133. In examining the plaintiff's unequal pay for equal work claim, the court noted:

> the plaintiff may introduce in an individual disparate treatment case statistics evidencing an employer's pattern and practice of discriminatory conduct, which "may be helpful to a determination of whether" the alleged discriminatory act against the plaintiff "conformed to a general pattern of discrimination against" members of a protected group. Although statistics are "of probative value in an individual discrimination case for the purpose of showing motive, intent, or purpose," that evidence is "not determinative of an employer's reason for the action taken against the individual grievant."

Id. at 1135 (citations omitted).

Although the court expressed some doubt as to whether statistics alone could establish a prima facie unequal pay for equal work case, the court found that plaintiff had made out such a case by showing she was paid less than her successor for doing an identical job without regard to any statistical showing. The employer sought to prove that the salary differential was due to a factor other than sex, i.e., that the male had more experience than the plaintiff. The court said that plaintiff's statistical proof should be considered as evidence rebutting the employer's proof that the salary disparity was premised on a factor other than sex. *Id.* at 1137. ("[A]lthough the statistics only showed raw data about the salaries of the workers in the white-collar departments and did not include variables which might reflect on salary such as education, prior experience, and seniority, the statistics did tend to show that women at [the employer] were generally on the bottom rung of the pay ladder." *Id.* at 1134.)

[307] 561 F. Supp. 769 (S.D. N.Y. 1983).

In *Orahood* v. *Board of Trustees*,[209] another discriminatory treatment case, the female plaintiff claimed that she was denied a job reclassification and salary increase because she was a female, even though her supervisors had recommended both actions. To establish her prima facie case, she sought to show a pattern and practice of paying women in administrative positions less than men.

The plaintiff relied, in part, on a Higher Education Staff Information Report (EEO-6), which noted that the employer employed 21 males and 34 females in the full-time professional nonfaculty category:

> Twelve of the 21 males earned in excess of $16,000, while only six of 34 females earned over that amount. The district court was unpersuaded by these "raw numbers" because there was no evidence indicating the experience, education, seniority or other qualifications of the employees. The EEO-6 report also did not give a description of the exact jobs involved.
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> Although the statistical data is insufficient to establish a pattern and practice, it, together with the several recommendations that [plaintiff] be reclassified, leads us to conclude that [plaintiff] had established a prima facie case here. Without other explanations, the inference is that sex played an impermissible role in the decision not to reclassify [plaintiff]. The district court erred in its conclusion otherwise.[210]

The court found, however, that the employer rebutted the prima facie case by showing that the denial of plaintiff's reclassification was for a reason other than sex, in this instance, that her office was not large enough to need two supervisors. The plaintiff was unable to show that this reason was pretextual.[211]

The U.S. Court of Appeals for the Ninth Circuit also found that "generalized statistics are relevant to an individual [disparate treatment] action under Title VII" in *Heagney* v. *University of Washington*.[212] There, the plaintiff alleged she was paid less because of her sex. She introduced a variety of statistical data, including some collected by the EEOC and the Office for Civil Rights (OCR) at the Department of Education. However, the lower court had refused to admit as evidence the results of an outside job evaluation study, because it had been based on 1975 salary data and the plaintiff had resigned in March 1973. The study showed:

> a salary curve the firm prepared for the University that would insure that jobs with similar point rankings would receive comparable salaries. The report also includes a table showing how the salaries of exempt jobs in January 1975 actually compared with this curve. In relation to the salary curve, the University paid 39.2 percent of the women exempt employees below what the report established as a minimum salary. The comparable figure for male employees was 19.8 percent. The table shows that the University overpaid 14.5 percent of its exempt male employees, while it overpaid only 4.6 percent of its female employees. Thus approximately twice the percent of women were underpaid than men and more than three times the percent of men were overpaid than women. The study demonstrates a significant salary disparity between male and female exempt employees.[213]

The appellate court stated that plaintiff's statistics based on EEOC and OCR data "do not adequately indicate the nature of the work performed, or whether females were denied promotions or pay raises they were entitled to receive. No meaningful comparison of female and male salaries is possible from these statistics."[214]

The court found, however, that the job evaluation study should have been entered into evidence by the lower court, even though it used data after her employment ended, because it "was probative as to the existence of conditions" at that earlier time and because the job evaluation study "apparently adjusts for deficiencies in these earlier statistics by establish-

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[208] *Id.* at 774. Those factors included age, years of service with the employer, academic degrees, quality of academic degree, certificates and credentials, and time elapsed between successive degrees and since the last degree. "An independent variable for sex was included in each of the analyses." *Id.* The court rejected the employer's criticism of plaintiffs' statistics, including the failure to account for academic department and thus to reflect different market conditions for each department. With respect to the latter, the employer's expert testified that, owing to the large number of academic departments, taking them into account would not have improved the statistical model. "Title VII regression studies, moreover, need not account for every factor that conceivably might explain differences in salaries or promotions." *Id.* at 779 (citations omitted).

[209] 645 F.2d 651 (8th Cir. 1981). Although decided before the Supreme Court's decision in *Gunther*, the court relied on the Ninth Circuit's decision in that case in concluding that Title VII reaches cases other than those of unequal pay for equal work.

[210] *Id.* at 656 (footnote omitted).

[211] *Id.*

[212] 642 F.2d 1157, 1164 (9th Cir. 1981).

[213] *Id.* at 1160.

[214] *Id.* at 1164 (footnote omitted).

ing a standardized basis for comparing job content with pay even though the job may be unique."[215] The court also noted (1) that plaintiffs' supervisors wrote three memoranda noting that her salary was low for a chemist and low in comparison to other employees and exempt staff; and (2) that both the EEOC and OCR had concluded that sex discrimination in setting her wage had likely occurred.[216] Thus, the court remanded the case to the district court for further proceedings.

In *Spaulding* v. *University of Washington*,[217] the court of appeals for the Ninth Circuit refused to "infer intent merely from the existence of wage differences between jobs that are only similar. *Gunther* does not require this. The comparability of jobs, however, can be relevant to determining whether we can infer discriminatory animus."[218]

The court also rejected use of a "comparability plus" test for wage claims under Title VII, i.e.:

> requiring only some degree of job comparability plus some combination of factors including direct and circumstantial evidence of discriminatory conduct and pay disparities. This would be, the nursing faculty argues, a sliding scale where the "plus" factors vary in inverse proportion to the degree of comparability shown. We reject the proposal and do not read *Gunther* as providing such a test. *Gunther* explicitly refused to adopt a precise formula for Title VII litigation. Such an unwieldy test might allow plaintiffs to bolster inadequate showings of comparability with a confusing potpourri of "plus factors," plunging courts into standardless supervision of employer/employee relations.[219]

The court also rejected the contention that the fact that the three members of the employer's budget committee were men supported an inference of discriminatory intent, and rejected plaintiffs' statistical evidence as unreliable.[220]

In *Sobel* v. *Yeshiva University*,[221] female members of a medical faculty alleged sex-based wage, promotion, and other discrimination. The court acknowledged that heavy reliance on statistics may be used to establish a prima facie case under a disparate treatment claim, but rejected such statistical evidence as was proffered by plaintiffs. One of the deficiencies the court found in this evidence was its unsatisfactory effort to measure the effect of individual productivity on pay. Such productivity included factors such as "quality of research, quality of teaching, quality and quantity of clinical work, number and significance of publications, reputation, generation of private practice, development of an important clinical process, procurement or administration of a major grant, any offer of employment from a competing college, mobility, significance of any contributions to science, and, more generally, the manner in which a faculty member spent his or her time."[222] The court also noted that there was no anecdotal evidence of any value.

In *Greenspan* v. *Automobile Club of Michigan*,[223] the plaintiffs introduced evidence under their disparate treatment claim that, for 7 years, the mean weekly salary of women was consistently less than the salary of male employees, even when excluding top management from the analysis.[224] Plaintiffs also purported to show that men with work and educational experience similar to women were offered higher salaries when hired. The court concluded that testimony about specific employer treatment, the statistical evidence on average yearly salaries, evidence concerning intentional sex discrimination in promotions and transfers, and evidence of overall patterns of female employment led to the conclusion of intentional wage discrimination on the basis of sex.

In *Briggs* v. *City of Madison*,[225] a disparate treatment case, the court did not rely on statistical evidence to determine that plaintiffs had established a prima facie case. There, female public health nurses claimed they were intentionally paid less than male sanitarians because of their sex. The court heard testimony about each job, including testimony from a job evaluation expert. The expert offered the opinion that "the classification of public health nurse is equal to or exceeds the relative worth when the two positions are compared on the factors of skill, responsibility, effort, and condition."[226]

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[215] *Id.* at 1165.

[216] *Id.* at 1165-66.

[217] 740 F.2d 686 (9th Cir.), *cert. denied*, 105 S.Ct. 511 (1984).

[218] *Id.* at 700–01.

[219] *Id.* at 701.

[220] *Id.* at 701–02, 703–04.

> The statistics were not based on a regression model. The selection of comparable faculty in other departments unrealistically assumed the equality of all master's degrees, ignored job experience prior to University employment and ignored detailed analysis of day-to-day responsibilities. Finally, the nursing faculty's statistics never compared female nursing wages to wages of *female* faculty in other departments. Without such a comparison, we have no meaningful way of determining just how much of the proposed wage differential was due to sex and how much was due to discipline. The statistics were generated from input that failed to control for exactly those differences between individuals that can legitimately lead to their being treated differently.

Id. at 704 (emphasis in original) (footnotes omitted).

[221] 566 F. Supp. 1166 (S.D. N.Y. 1983).

[222] *Id.* at 1179. Only one such factor was easily measured, rate of publication, but the court viewed this as a flawed indication of productivity in part because "researchers had greater opportunity to publish than did clinicians." *Id.* The plaintiffs' effort to use proxies to account for productivity was inadequate. *Id.*

[223] 495 F. Supp. 1021 (E.D. Mich. 1980).

[224] *Id.* at 1044. Evidence introduced under plaintiffs' disparate impact claims is not discussed here.

[225] 536 F. Supp. 435 (W.D. Wis. 1982).

The court concluded that: "plaintiffs have made a prima facie case of sex discrimination by showing that (1) they are members of a protected class (2) occupying a sex-segregated job classification (3) that is paid less than a (4) sex-segregated job classification occupied by men and (5) that the two job classifications at issue are so similar in their requirements of skill, effort, and responsibility, and working conditions that it can reasonably be inferred that they are of comparable value to an employer."[227] The court then found the employer had rebutted the prima facie case by showing the labor market compelled it to offer higher wages to attract sanitarians.[228]

In *Taylor* v. *Charley Brothers Co.*,[229] a pre-*Gunther* decision, the court concluded that the employer had intentionally paid women in one job less than men in another because the women worked in a female-only job, "and not because the jobs they performed were inherently worth less than the jobs performed by the men. . . ."[230] The court inferred this "from the fact that [the employer] had not undertaken any evaluation which would have indicated the value of the jobs held by either men or women; from its pattern and practice of segregating women within a single department within the company; from its pattern and practice of only considering women job applicants for openings in that department; and from various discriminatory remarks made by company officials."[231]

In *Connecticut State Employees* v. *State of Connecticut*,[232] female plaintiffs alleged that the employer intentionally discriminated against them by paying them less for work the employer had decided was of comparable or equal value to work performed by more highly paid men. In denying a motion to dismiss the complaint partially, the court stated: "This Court will not engage in a subjective comparison of the intrinsic worth of various dissimilar jobs. If the plaintiff's allegations are proven, however, and if the defendants did in fact determine that dissimilar jobs were of equal value, but did not provide equal pay because of the sex of the employees, then this would be evidence of intentional discrimination."[233]

In *Lanegan-Grimm* v. *Library Association of Portland*,[234] a female bookmobile driver/clerk alleged she was paid less for her work than a male delivery truck driver. The court determined that the two jobs were sufficiently similar to find an Equal Pay Act violation and also to establish a prima facie case of intentional wage discrimination under Title VII. The court noted, with respect to Title VII, not only that the employer paid the plaintiff less than the truck driver, but that the truck driver had a history of receiving more pay than bookmobile drivers. The court also noted that the employer had used mostly women as bookmobile drivers and only men as truck drivers; i.e., the jobs were sex segregated and sufficiently similar to create an inference of intentional discrimination in their disparate wages. Moreover, the court noted that even if a female rose to the highest pay level for a bookmobile driver, she would still receive less than the truck driver, regardless of how much seniority she accumulated.[235]

The court determined that the employer's explanation for the pay disparity was pretextual, based in part on a supervisor's remark that she was paid less because the delivery truck driver was a male and head of a household, and on a sexist remark of the head librarian.[236]

In *Stathos* v. *Bowden*,[237] two female plaintiffs claimed their employer (a public commission) violated both 42 U.S.C. sec. 1983, which forbids "any person acting under color of state law to deprive

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[226] *Id.* at 440–41.

[227] *Id.* at 445. The court rejected the argument that only the first four factors establish a prima facie case. *Id.* at 444–45.

[228] *Id.* at 446–48. *See* discussion of "market" defenses below.

[229] 25 Fair Empl. Prac. Cas. (BNA) 602 (W.D. Pa. 1981).

[230] *Id.* at 614.

[231] *Id.*

[232] 31 Empl. Prac. Dec. (CCH) 29,448 (D. Conn. 1983).

[233] *Id.* at 29,450. The district court in Power v. Barry County, 539 F. Supp. 721, 726 (W.D. Mich. 1982), also rejected a theory of recovery on a wage claim requiring it to undertake an "evaluation of the relative worth of two distinct jobs."

[234] 560 F. Supp. 486 (D. Or. 1983).

[235] *Id.* at 494.

[236] *Id.*

[237] 728 F.2d 15 (1st Cir. 1984).

'any citizen. . .of any rights. . .secured by the Constitution. . .','"[238] and 42 U.S.C. sec. 1985(3), which prohibits persons from conspiring to deprive any person of the equal protection of the laws. The plaintiff relied on informal and formal job evaluations and anecdotal evidence.

In 1977 a manager drew up a chart listing Stathos as head of the business office, with her coplaintiff reporting to her. Stathos received little more than half of what three male department heads received; her coplaintiff's salary was at about the same ratio with the men who reported to the male department heads. Because he believed the chart reflected equivalent rank, the manager unsuccessfully recommended pay raises for both plaintiffs. The employer also rejected 5 percent pay raises for each.[239]

In 1979 the employer did move to narrow the gap. In January 1980 the employer retained a professional management firm "to describe, compare, and suggest pay" for 35 positions.[240] The firm's report recommended pay raises for both plaintiffs. The employer adopted the report, but it denied the plaintiffs the pay increases the report recommended, the only two such denials.[241]

Later in 1980 the coplaintiff asked the manager to change her job title because she was about to lose civil service protection. Her manager persuaded the employer to make the change in a 4–1 vote by the commissioners. When she asked the sole dissenter about his vote, he said he thought "the girls" were seeking too much money. He also said the commission vote would change because he had spoken to another commissioner. The commissioners then reversed themselves, voting to deny the change in job title by a 4–1 vote.[242]

The plaintiffs also had other evidence of intentional sex discrimination and the appellate court affirmed the trial court's judgment in their favor.

The establishment of a prima facie case of intentional sex-based wage discrimination outside of the context of equal pay for equal work will vary from case to case. Some cautionary points, however, should be noted:

1. Although gross statistical disparities may sometimes establish a prima facie case of discrimination, thus requiring the employer to produce rebuttal evidence under the *Burdine* standard, such statistical evidence must be developed and used with care; it must take into account the variety of factors that influence pay.[243] In the absence of a gross statistical disparity, additional evidence, including circumstantial or anecdotal evidence, should always be produced before a prima facie case is established.

2. The results of a job evaluation study, or expert testimony concerning the "comparability" of different jobs, standing alone or in conjunction with slight statistical disparities, should never be sufficient to establish a prima facie case and place a rebuttal burden on an employer. Job evaluation studies serve a useful role in labor-management relations, but, as chapter 3 pointed out, they have their limitations. They cannot demonstrate the value or worth of a job to a legal certainty. They are not the only factors in establishing pay, as other factors, such as labor supply and demand, and seniority, are also highly relevant. Moreover, they are subjective and result oriented. They cannot establish discrimination on the basis of sex.

Accordingly, reliance on job evaluation studies or testimonial evidence of job comparability in the establishment of a prima facie, sex-based wage discrimination case involving two different jobs, in the absence of gross statistical disparities or anecdotal or other evidence, including circumstantial evidence, is seriously misplaced. Further, by permitting the results of a job evaluation to establish a prima facie case, courts and Federal agencies may actually deter employers from using such evaluations.

If other evidence is present, such as relevant gross statistical disparities or relevant lesser statistical disparities together with anecdotal or other evidence, results of a job evaluation study may properly be used as some evidence bearing on the issue of intentional discrimination in the establishment of a prima facie case. Of course, if sufficient evidence can be shown that the job evaluation study was developed for the purpose of discriminating, that alone should be sufficient to establish a prima facie case.

3. An employer may rely on the factors of seniority, merit, quantity or quality of production, and "any other factor other than sex" in rebutting a prima facie case.

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[238] *Id.* at 17.

[239] *Id.*

[240] *Id.* at 18.

[241] *Id.*

[242] *Id.*

[243] Many cases, cited in the section "Elements of Proof" of this chapter, including those cited in note 199, make this clear.

"Market" Defenses

Another important question in Title VII sex-based wage discrimination cases outside of the equal pay for equal work framework is the permissibility of an employer's reliance on market factors as a defense to a wage discrimination claim. This defense will typically be asserted as a "factor other than sex" under the fourth affirmative defense incorporated into Title VII by the Bennett amendment. Plaintiffs in sex-based wage discrimination cases have argued that employers should not be allowed to assert a market defense under Title VII[244] because the Supreme Court has rejected this defense for Equal Pay Act cases in *Corning Glass Works* v. *Brennan.*[245] There, the Court stated:

> [A pay] differential [that] arose simply because men would not work at the low rates paid women inspectors. . .reflected a job market in which [the employer] could pay women less than men for the same work. That the company took advantage of such a situation may be understandable as a matter of economics, but its differential nevertheless became illegal once Congress enacted into law the principle of equal pay for equal work.[246]

Plaintiffs argue that this principle is equally applicable to Title VII cases.[247]

Indeed, one expert has stated:

> If the market is no defense to sex-based wage discrimination claims under the Equal Pay Act, why should it be a defense to such claims under Title VII? There is no ethical or legal reason for prohibiting the defense in one context and permitting it in the other. This conclusion is legally compelled by *Gunther's* teaching that the Bennett amendment makes the Equal Pay Act's four affirmative defenses applicable to Title VII wage discrimination claims. It was in the context of one of these—the fourth or "factor other than sex" defense—that the market was first asserted and rejected as a legitimate basis for sex-based wage differentials.[248]

These observations, however, ignore an obvious difference: these cases are about different pay for *different* jobs. In unequal pay for equal work cases, there is discrimination on the face of it; in these comparable worth cases, as previous chapters have shown,[249] the market not only plays a very important role in pay setting, but there is *also* no legally certain, "objective" way of comparing the value or worth of two different jobs.[250]

It has also been stated:

> "[T]he market" can no more be used to defend sex-based wage discrimination or justify its perpetuation than it can be raised as a justification for racial or ethnic or religious discrimination. Few would publicly suggest that Title VII permits an employer to exploit black workers by paying them lower wage rates than whites simply because the black unemployment rate is so tragically high and the supply of blacks is so much greater than the demand. Why, then, should the same "market" argument—oversupply of women for "women's" jobs—be a defense to sex discrimination?
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> Imagine yourself at your breakfast table tomorrow morning, opening your paper to read the following headline:
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> > Supreme Court Says High Black Unemployment Rate Justifies Lower Wages for Black Workers!
>
> Reading on, you find that the Court has accepted employer arguments that the "supply" of black labor far exceeds the "demand" for the meager number of jobs into which they are segregated. Accordingly, the employer argues and the Court agrees, it makes perfect business sense to take full advantage of this tragic situation, and there is no Title VII violation.
>
> Everyone in this room would react with a sense of disbelief, shock, and outrage at that news.[251]

This formulation, however, misstates the issue. The "market" argument in this context is not that an oversupply of women (or blacks) for the *same* jobs excuses sex (or race) discrimination. Rather, the argument is that the supply of people of *both* sexes and *all* races for two *different* jobs and demand for workers in those different jobs—in short, the market (together with other nondiscriminatory factors such as merit or seniority)—explain the differences in pay. An equal pay claim, in contrast, involves the same or substantially the same jobs; different pay there, absent an explanation such as merit or seniority, reflects discrimination on its face.[252]

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[244] *See, e.g., Briggs,* 536 F. Supp. at 446–47; *see also* Newman paper, pp. 143–47.

[245] 417 U.S. 188 (1974) (wage differential between male night shift inspectors and female day shift inspectors, when no other night workers received higher pay than corresponding day workers, illegal under Equal Pay Act even though based on market factors).

[246] *Id.* at 205. Other courts have consistently rejected market defenses as a "factor other than sex" under the Equal Pay Act. *See, e.g.,* Laffey v. Northwest Airlines, Inc., 567 F.2d 429, 451 (D.C. Cir. 1976), *cert. denied,* 434 U.S. 1086 (1978); Brennan v. Victoria Bank and Trust Co., 493 F.2d 896, 902 (5th Cir. 1974); Hodgson v. Brookhaven Gen. Hosp., 436 F.2d 719, 726 (5th Cir. 1970); Marshall v. Georgia Southwestern Coll., 489 F. Supp. 1322, 1330–31 (M.D. Ga. 1980); *but see* Horner v. Mary Inst., 613 F.2d 706 (8th Cir. 1980) (no violation of Equal Pay Act where employer showed that male teacher rejected first offer of the same salary at which it hired female teacher and demanded higher salary that he could get from another employer).

[247] *See, e.g., Briggs,* 536 F. Supp. at 447.

[248] Newman paper, pp. 143–44 (footnote omitted).

[249] *See* chap. 3; papers of Alvin O. Bellak, Herbert E. Northrup, and Donald P. Schwab, Consultation, vol. 1; and Ray Marshall, testimony, Consultation, vol. 2, p. 132.

[250] Moreover, the Supreme Court specifically declined to address the interpretation of the fourth affirmative defense in *Gunther,* 452 U.S. at 166 n.8, 171.

[251] Newman paper, pp. 133, 143.

Some opponents of the market defense argue that the market itself reflects societal biases and stereotypes regarding the value of women's work, thus perpetuating historical discrimination against women:[253]

> [I]t is abundantly clear that the market is extremely tainted by both past and *present* sex discrimination. New violations of the EPA and Title VII's prohibitions against wage discrimination crop up each year. These intentionally discriminatory wage rates become part and parcel of the "market" and are then reflected in the current wages of women workers. Similarly, unquestionable past discrimination—e.g., Westinghouse's intentional depression of wage rates for women's jobs—continues to work its invidious effect on women's wages.
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> [P]ast and present discrimination against women workers in "the market" in *every aspect* of employment, coupled with other societal forces that prescribed the proper realm and role for women, has placed them in a position of distinct disadvantage in the labor market. As was true in *Griggs*, these factors should not be allowed to work a "cumulative and invidious burden" on women in the form of lower wages and subsequent lower pensions for the remainder of their lives.[254]

This deep-seated hostility to the market, as mentioned earlier in this report,[255] is a necessary feature of comparable worth doctrine. However, there is not a scintilla of evidence in the legislative history of Title VII to suggest that Congress intended to forbid an employer from relying on market factors or the prevailing wage rates of his or her competitors. If, in banning wage discrimination, Congress had intended such a radical departure, it is likely that there would be some evidence of that intent.

Courts have generally agreed that employers may legitimately consider market factors in pay setting and make such a defense in a Title VII case:

> The courts' recognition of such market factors as a legitimate employer consideration in setting wage scales is consistent with the basic principles of our free market economic system. Unless we are prepared to alter that system radically, a rule of law that forces employers to ignore prevailing market wages in setting pay scales, or that holds individual employers responsible for market conditions they did not create, simply cannot work.[256]

In *Christensen* v. *State of Iowa*,[257] a pre-*Gunther* case, female plaintiffs claimed that their employer's modification of a pay scheme recommended by a job evaluation in order to reflect market conditions was "not necessary to attract workers [to the predominantly male job to which they compared their own], but [is], instead, merely a continuation of a long history of sex discrimination in the local job market."[258] The plaintiffs added:

> that UNI's [the employer's] policy violates Title VII by perpetuating wage differences resulting from past discrimination. They argue that long-standing discriminatory practices in the local job market, which channeled women workers into a small number of jobs, resulted in an oversupply of workers and depressed wages in those jobs. Therefore, UNI's reliance in part upon prevailing wage rates in determining beginning pay scales for jobs of equal worth to the university serves to carry over the effects of sex discrimination in the marketplace into the wage policies of the college.[259]

The court rejected the plaintiffs' argument:

> This argument misconstrues the purposes of Title VII. The federal policy embodied in Title VII is that individuals shall be entitled to equal *opportunities* in employment on the basis of fitness and without discrimination because of race, color, religion, sex, or national origin. This policy is reflected in the statute's title "Equal Employment Opportunity," as well as in the preamble to Executive

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[252] Thus, in an unequal pay for *equal* work case under Title VII, as well as under the EPA, reliance on the market should not be a permissible defense.

[253] *See, e.g.*, Kouba v. Allstate Ins. Co., 523 F. Supp. 148, 160–61 (E.D. Cal. 1981), *rev'd*, 691 F.2d 873 (9th Cir. 1982); Newman paper, pp. 143–47; Joy Ann Grune, "Pay Equity is a Necessary Remedy for Wage Discrimination," Consultation, vol. 1, pp. 168–69; Newman testimony, p. 99.

[254] Newman paper, p. 144 (footnotes omitted) (emphasis in original). Yet, this same expert earlier had stated: "[I]n the area of wage discrimination as elsewhere [under Title VII], *individual employers* are to be held liable for their *own individual acts of discrimination*. Indeed, wage rates and compensation practices of other employers are basically irrelevant to the issue of whether a particular employer has paid its female employees a discriminatory wage." *Id.* at 132 (emphasis in original).

[255] *See, e.g.*, chap. 3.

[256] Williams paper, p. 155.

[257] 563 F.2d 353 (8th Cir. 1977).

[258] *Id.* at 354–55.

[259] *Id.* at 355–56 (footnote omitted).

> Order No. 11478, its counterpart in the area of federal employment:
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> "It has long been the policy of the United States Government to provide equal opportunity in Federal employment on the basis of merit and fitness and without discrimination because of race, color, religion, sex, or national origin."
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> * * *
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> Equality of opportunity is not at issue here. Instead, appellants seek a construction of Title VII that may establish a prima facie violation of that Act whenever employees of different sexes receive disparate compensation for work of differing skills that may, subjectively, be of equal value to the employer, but does not command an equal price in the labor market. Appellants' theory ignores economic realities. The value of the job to the employer represents but one factor affecting wages. Other factors may include the supply of workers willing to do the job and the ability of the workers to band together to bargain collectively for higher wages. We find nothing in the text and history of Title VII suggesting that Congress intended to abrogate the laws of supply and demand or other economic principles that determine wage rates for various kinds of work. We do not interpret Title VII as requiring an employer to ignore the market in setting wage rates for genuinely different work classifications.[380]

The court concluded that plaintiffs had not established a prima facie case because they "failed to demonstrate that the difference in wages paid to clerical and plant employees rested upon sex discrimination and not on some other legitimate reason."[381]

The court of appeals for the Fifth Circuit, in rejecting a claim that women faculty members were paid less than male faculty members, took into account "market forces" in pay setting.[382]

In the *Briggs* case,[383] public health nurses established a prima facie case of a Title VII wage violation when they showed they were paid less than all-male sanitarians whose work was deemed of comparable value to the employer. The employer sought to introduce evidence that State and other municipal employers paid higher wages to sanitarians and that, in order to attract them, the employer had to pay them more.

The plaintiffs stated the employer could not rely on market demands or on its perception of those demands. They argued "that the market reflects the biases and stereotypes of the value of women's work, and, in particular, reflects the devaluation of nurses' salaries resulting from female domination of the nursing field. . . ."[384]

The court rejected the plaintiffs' contention and referred to its earlier discussion:

> I find unpersuasive the basic premise that. . .any one possesses the intellectual tools and data base that would enable them to identify the extent to which the factor of discrimination has contributed to, or created, sex-segregated jobs, and to separate that factor from the myriad of nondiscriminatory factors that may have contributed to the same result. Equally unpersuasive is the contention that a direct correlation can be shown to exist between the lower pay scales for jobs characterized as "women's work" and the fact that the jobs are so characterized. Although I share the belief that there is probably some correlation, I do not share [the] conviction that the job characterization factor is the only determinative of pay scales. . . .[T]his assertion. . .ignores other potentially determinative factors, such as "crowding" (a heavy concentration of women available for the same job), the willingness or unwillingness of women to organize for higher wages and increased benefits, and the historical reality that many of [these] jobs characterized. . .as "women's work" are jobs that have never been well-compensated, whether they have been filled by women or by men.
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> For purposes of litigation, [this] thesis suffers also from its exclusive focus upon historical events and societal attitudes, rather than upon allegedly unlawful acts of the employer who is the defendant in the lawsuit. The plain language of Title VII indicates the Congressional intent to influence and affect the conduct of employers. The statute's prohibitions are directed at the employer's employment practices; the statute's sanctions are directed at the employer who violates the prohibitions and engages in an unlawful employment practice. ***The statute's remedial purpose is not so broad as to make employers liable for***

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[380] *Id.* (footnote omitted) (citation omitted) (emphasis in original). The court noted that this was not a case of an employer relying on the market to pay women less than men doing substantially equal work, which it acknowledged is a violation of the EPA. *Id.* n.7. *See also* Lemons v. City and County of Denver, 620 F.2d 228 (10th Cir. 1980), *cert. denied*, 449 U.S. 888 (1980), where female nurses claimed their employer was paying them less than it paid others, in different jobs of equal value. Plaintiffs made arguments similar to the plaintiffs' arguments in *Christensen*. The court relied on *Christensen* in rejecting the claim. *Id.* at 230.

[381] *Christensen*, 563 F.2d at 355. The Eighth Circuit subsequently reaffirmed its view that reliance on market factors for a pay disparity is permissible (in that case, a market-factor increase was a defense in a disparate impact, sex-based wage discrimination claim). Craik v. Minn. State Univ. Bd., 34 Fair Empl. Prac. Cas. (BNA) 649, 661 (8th Cir. 1984).

[382] Wilkins v. Univ. of Houston, 654 F.2d 388, 402 (5th Cir. 1981), *vacated and remanded*, 459 U.S. 872 (1982), *aff'd on remand*, 695 F.2d 134 (5th Cir. 1983).

[383] 536 F. Supp. 435 (D. Wis. 1982).

[384] *Id.* at 447.

> *employment practices of others or for existing market conditions.*[265]

Moreover:

> *Under Title VII, an employer's liability extends only to its own acts of discrimination. Nothing in the Act indicates that the employer's liability extends to conditions of the marketplace which it did not create. Nothing indicates that it is improper for an employer to pay the wage rates necessary to compete in the marketplace for qualified job applicants. That there may be an abundance of applicants qualified for some jobs and a dearth of skilled applicants for other jobs is not a condition for which a particular employer bears responsibility.*[266]

The plaintiffs, citing case law, also argued that reliance on the market as a defense is inappropriate.

> Those decisions are inapposite in a case such as this where plaintiffs are contending not that essentially identical skills are required for both of the jobs at issue, but rather, that the kinds of skills are closely related and that the skills are substantially similar in the amount of education and levels of the on-the-job training required. In the cited Equal Pay Act cases, the jobs were so similar as to be interchangeable; that is, a female worker could perform the job held by male workers, if given the opportunity, and vice versa. *Where, however, different skills are required for the performance of the jobs, the employer may explain and justify an apparent illegal wage disparity by showing that persons possessing the requisite skills are commanding higher wage rates in the local market.*[267]

Plaintiffs and others have also cited *Norris* v. *Arizona Governing Committee.*[268] There, the Court examined an employer policy that offered employees a range of retirement benefits from different companies, all of which paid a woman lower monthly benefits than a man even though males and females made the same contributions to any plan. The Court ruled that the employer thereby violated Title VII. But in such a case, the *same* employment benefit, i.e., a monthly retirement payment, was not available equally. In that sense, Title VII's proscription is analogous to the Equal Pay Act's proscription of unequal pay for equal work: in *Norris*, an unequal fringe benefit for an equal contribution toward the benefit. This is in contrast to different pay for two *different* jobs, since a comparison between different jobs is inherently subjective, and their "worth," unlike a comparison of monthly retirement benefits, cannot be determined with certainty. Thus, the Ninth Circuit's remark that "Title VII has never been construed to allow an employer to maintain a discriminatory practice merely because it reflects the market place,"[269] which makes sense when the *same* term of employment, monthly benefits, is not paid evenhandedly, is inapt when comparing two different jobs. In the latter circumstance, the marketplace is not a justification for discrimination, but rather a nondiscriminatory explanation for why two different jobs are paid what they are paid, in other words, why the wages are *not* discriminatory.

Similarly, the Supreme Court's holding in *Los Angeles Department of Water and Power* v. *Manhart,*[270] that Title VII prohibits requiring female employees to make larger contributions in order to receive equal monthly pension benefits, is not reasonably applied when two different jobs are at issue.

The plain fact remains that Title VII nowhere indicates, on its face or in its legislative history, that an employer's reliance on market factors, resulting in different wages for different jobs, is illegal, regardless of whether a subjective analysis suggests that the jobs are comparable.

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[265] *Id.* at 444–45 (emphasis supplied) (footnotes omitted).

[266] *Id.* at 447 (emphasis supplied).

[267] *Id.* (emphasis supplied) (citing *Corning Glass* and Hodgson v. Brookhaven, 436 F.2d 719 (5th Cir. 1970)).

[268] 103 S.Ct. 3492 (1983). *See* Newman paper, p. 144.

[269] Norris v. Ariz. Governing Comm., 671 F.2d 330, 335 (9th Cir. 1982), *aff'd in part, rev'd in part,* 103 S.Ct. 3492 (1983).

[270] 435 U.S. 702 (1978).

Chapter 5

Findings and Recommendations

Not every claim of discrimination, nor for that matter every purported remedy for discrimination, is valid. Public policy makers must make principled judgments on the merits of such claims and must not yield to political expediency or attractive sloganeering.

There will be cases when, in the face of urgent claims for a purported theory of discrimination or of relief, the proper, reasonable answer is to say, "No." The claims for implementation of comparable worth are clearly such a case. Sex-based wage discrimination is a serious matter. However, there *are* currently existing ways to remedy it, and the implementation of the unsound and misplaced concept of comparable worth would be a serious error.

Findings

1. The wage gap between female and male earnings in America results, at least in significant part, from a variety of things having nothing to do with discrimination by employers, including job expectations resulting from socialization beginning in the home, educational choices of women who anticipate performing child-bearing and child-rearing functions in the family and who wish to prepare for participation in the labor force in a manner that accommodates the performance of those functions, the desire of a number of women to work in the kinds of jobs that accommodate their family roles, and the intermittency of women's labor force participation.

2. Statistical studies that try to account for the wage gap usually show an unexplained residual, a percentage of the gap that cannot be attributed to the factors measured in the study. However, this residual is not necessarily the result, in whole or in large part, of sex discrimination. It might be due to unobservable, nondiscriminatory factors. There is widespread agreement among analysts on the inability of their current statistical methods to analyze all factors bearing on pay.

3. It is profoundly mistaken to base a discrimination remedy, such as comparable worth, on statistics about the wage gap. To say this is not to suggest that there is no sex discrimination in the setting of wages or that no part of the wage gap can be attributed to discrimination. Since the wage gap is not entirely due to discrimination, however, it is wrong to try to eradicate that gap in the name of antidiscrimination.

4. The effects of socialization in the home and the role women play in the family generally, which affect their choices of jobs, career expectations, and participation in the labor force, should not be borne by innocent employers. Things that are beyond an employer's control should not be the basis for a finding that an employer has discriminated.

5. Similarly, if discrimination in education has affected the job choices of women, the remedy does not lie in penalizing employers who hire, promote, and pay on a nondiscriminatory basis. Rather, the remedy lies in eliminating the discrimination in education.

6. Discrimination in pay is properly remediable under the Equal Pay Act of 1963 and Title VII of the Civil Rights Act of 1964.

7. Job evaluation studies, which would play an important role in the implementation of comparable worth doctrine, are inherently subjective. They cannot establish the "value" or "worth" of a job. Rather, they are used to establish rational pay-setting policies within an organization, satisfactory to the organization's employees and management. Further, they work only with reference to the external market of labor supply and demand, as well as internal factors.

8. Job evaluation studies cannot prove the existence of sex-based wage discrimination.

9. The setting of wages is not, and cannot be, divorced from the forces of labor supply and demand. These factors heavily influence the setting of pay in many jobs and play an important role in setting wages for virtually all other jobs. Merit, seniority, quality or quantity of production, and collective bargaining also affect wages.

10. A mere disparity between two different jobs that are purportedly of comparable worth to an employer, as set forth in a job evaluation study, by itself is neither discrimination nor the result of discrimination. Other evidence must be added before a prima facie case of discrimination can be established.

11. The Commission strongly endorses the right of women and men to assert claims of sex discrimination in pay even when the claim does not involve equal pay for equal work.

12. The *Gunther* decision, however, was not premised upon the comparable worth concept. The decision permits plaintiffs to prove, by direct evidence, intentional, sex-based wage discrimination engaged in by an employer. Although the Supreme Court did not address a number of issues concerning the conduct of a Title VII sex-based wage discrimination claim, the *Gunther* case itself does not support the use of the comparable worth concept as a matter of antidiscrimination law.

13. An employer should be held accountable for his or her own conduct and policies, including the setting of wages. An employer should not be held accountable for the discrimination of others, including employers who discriminated in the past, State legislators who enacted State protective legislation, and educators who discriminated or continue to discriminate. Title VII is consistent with this sound public policy.

14. Title VII should prohibit disparate *treatment* in pay on the basis of sex. Application of Title VII's disparate *impact* theory to the setting of wages is inappropriate.

15. Disparate impact theory has developed in the context of *specific* employer policies or practices, such as particular tests, height and weight requirements, and fringe benefit policies. It is inappropriate to apply such a theory to an employer's wage-setting practices for different jobs precisely because those practices cannot be reduced to something specific and identifiable. Setting wages for different jobs usually involves complex and interrelated processes, sometimes including job evaluation studies (which are themselves frequently complex processes), seniority and merit systems, collective-bargaining relationships, and reliance on market factors. These processes are not entirely a product of the employer's independent business judgment.

16. In a case of unequal pay for *equal* work under Title VII, the employer should be required to bear the burden of proof, as is required under the Equal Pay Act. In a Title VII case that does *not* involve unequal pay for equal work, the usual Title VII burden of proof, as set forth in *Texas Department of Community Affairs* v. *Burdine*, should be imposed. Thus, in such a case, an employer bears only the burden of producing evidence of a nondiscriminatory reason rebutting the plaintiff's prima facie case, and not the burden of persuasion. The plaintiff retains the ultimate burden of persuasion.

17. The establishment of a prima facie case of intentional pay discrimination outside of the equal pay for equal work context will vary from case to case. Some cautionary points, however, should be noted: Statistical evidence must be developed and used with care and must take into account the wide variety of things that influence pay.

Moreover, there is no evidence in the language or legislative history of Title VII to suggest that Congress intended to prevent employers from relying on market factors. Title VII is only intended to eliminate each *individual* employer's acts of discrimination. Cliches such as "societal discrimination" are not a substitute for the analysis required under employment discrimination law, i.e., analysis of an employer's *own* conduct and policies.

18. If an employer reaches voluntary agreement with his or her employees (through the collective-

bargaining process or other means) and accepts comparable worth doctrine to set wages, that is a matter of labor-management relations outside the jurisdiction of this Commission. Agreements reached through such a process require only that parties to the dispute accept the terms of the final settlement. Despite the rhetoric sometimes used to secure wage concessions—including charges of sex-based wage discrimination—parties need not prove or disprove discrimination to resolve such a dispute.

Recommendations

1. We recommend that the Federal civil rights enforcement agencies, including the Equal Employment Opportunity Commission, reject comparable worth and rely instead on the principle of equal pay for equal work. Moreover, we recommend that the Justice Department resist comparable worth doctrine in appropriate litigation and advance the policies outlined in recommendations 11 through 17 in cases involving pay for different jobs.

2. We recommend that Congress not adopt legislation that would establish comparable worth doctrine in the setting of wages in the Federal or private sector.

Concurring Statement of Chairman Clarence M. Pendleton, Jr.

The Commission's report on comparable worth is the most exhaustive and indepth study of the subject conducted by an agency of the Federal Government to date. Its careful analysis should do much to illuminate a controversy characterized more often by heat than light. In my view, the more attention that is focused on this theory, the less credibility it will have.

The report is based on 2 days of Commission hearings on comparable worth in which 16 expert witnesses from the academic community, labor relations consulting firms, law firms, and advocacy groups, representing all points of view, presented formal papers and participated in vigorous panel discussions. In preparing this report during the ensuing 9 months, the Commission staff analyzed all of the data presented to it.

The issues examined in this report include the history and possible causes of the gap in earnings between men and women, the possible causes of job segregation, the use of job evaluation studies as one method of eliminating sex-based wage discrimination, the legal status of comparable worth doctrine in the courts, and the philosophical, economic, and social ramifications of mandating use of the comparable worth standard. In each instance—and in marked contrast to the practice of the prior Commission in such consultations—professional and academic experts on both sides of the issue were given an equal opportunity to present their views. Of the 16 witnesses who testified during the 2-day consultation, 8 generally supported implementation of the comparable worth theory, and 8 generally were opposed to it. This is a marked improvement over prior Commission consultations, which were often marred by a decidedly one-sided presentation of the issues, with few persons invited to appear who did not already share the Commission's views on the role of government or on race and gender preferences. That practice did no credit either to the Commission or to the process of an open, unbiased, and factual inquiry.

The earnings gap between men and women is the basis of the claims for implementation of a comparable worth standard in wage setting. Undeniably, a gap does exist. The 1983 pay ratio between men and women was 64.3 percent when based on annual earnings and 72 percent when based on hourly earnings. What the Commission report does, though, is to go beyond these figures to review the characteristics of the populations being compared, and to examine the various explanations offered by commentators whose research has focused on the earnings gap. The report finds that the gap between female and male earnings in America results, at least in significant part, from a variety of causes having nothing to do with sex-based wage discrimination.

The report also examines the fundamentals of job evaluation, since its role in the comparable worth scheme would be to mandate the use of a politically "acceptable" job evaluation scheme as the basis for wage setting, in place of the free market.

Moreover, the report casts considerable doubt on the inherent validity of these proffered job evaluation systems as a tool for setting wages in a market economy. Job evaluation, the report finds, is inherently subjective and works only with reference to the external market of labor supply and demand. Job evaluation serves a legitimate purpose in establishing wage-setting policies within a given organization satisfactory to management and employees, but it is unworkable as a substitute for the market, a result sought by proponents of comparable worth.

The legal issues surrounding comparable worth are also analyzed in this report. Prominent in the discussion are the Equal Pay Act and Title VII of the Civil Rights Act of 1964, the Federal statutory prohibitions of sex-based wage discrimination. As I have repeatedly emphasized, I support the vigorous enforcement of these two statutes against employer wage discrimination. Employers should be held accountable for their individual discriminatory acts or policies, but not, as comparable worth advocates would have it, for "societal discrimination," "familial socialization," or simply the choice of lower paying jobs by certain women based on anticipated child-rearing responsibilities that they choose when married.

Those courts that have considered wage discrimination claims based on a theory of comparable worth *per se* have overwhelmingly rejected it as a theory on which to base a complaint. The Eighth Circuit in *Christensen* v. *State of Iowa*, and the Ninth Circuit in *Spaulding* v. *University of Washington*, and Federal district courts in *Gerlach* v. *Michigan Bell Telephone Company*, in *Power* v. *Barry County*, and more recently, in *American Nurses Association* v. *State of Illinois* have all indicated that a comparable worth per se claim is not viable under Title VII. Moreover, in *American Federation of State, County, and Municipal Employees* v. *State of Washington*, the district court decision so often heralded as a major victory by comparable worth proponents, AFSCME attorney Winn Newman recently characterized the case in his argument before the Ninth Circuit as based not on comparable worth theory, but only as intentional sex-based wage discrimination because the State of Washington failed to pay salaries in accordance with the findings of the State's job evaluation study.

The rationale underlying Title VII is that individuals should not be denied the opportunity to move within the labor market because of their race, color, religion, sex, or national origin. Such opportunity is essential to the maintenance of a free market and has been the traditional goal of the civil rights movement. But the rationale underlying comparable worth is radically different. In place of the goal of equality of opportunity would be substituted the goal of equality of results. This is a radical departure from the policies underlying our market economy. To promote this kind of equality as fairness is a disingenuous attempt to restructure our free enterprise system into a state-controlled economy under the guise of "fairness."

The *New York Times* has written that: "A generation ago,. . .because they were mostly banned from many fields, women were much more likely than men to become teachers, nurses or stenographers. The remedy for that kind of segregation is to keep expanding women's opportunities in other lines of work and to let the market determine the 'worth' of men and women alike." (Editorial page, Jan. 2, 1985.)

Similarly, the *Washington Post* has written that: "the 'comparable worth' idea is viewed with understandable dismay by economists and businessmen who envision the havoc caused by a zealous bureaucracy charged with assigning 'fair' wages to every occupation in the economy." (Editorial page, Nov. 17, 1984.)

The Worchester, Massachusetts, *Telegram* aptly expressed its concern about comparable worth when it wrote: "The thought of government bureaucrats putting salary price tags on various professions and callings is enough to drive a person into the wilderness to become a hermit. Whole new disciplines will spring up for the purpose of comparing apples and oranges." (Editorial page, Nov. 25, 1984.)

The *San Diego Union* has written that: "The free market system remains the most effective means of determining comparable worth. Under this system, a job is worth precisely what someone is willing to pay for that job. Forcing employers to overpay will only result in less employment and reduced employment opportunities for women. If job discrimination exists, there are legal means of dealing with it short of letting bureaucrats and judges try to run this state." (Editorial page, July 1, 1984.)

Robert Lawrence of the liberal Brookings Institution has also criticized the comparable worth theory: "The best way to remove job inequities is to allow equality of opportunity, not to have the government fix pay scales."

Even A. Bartlett Giamatti, president of Yale University, which recently suffered through an employee strike for higher wages based on comparable worth theory, was quoted as saying: "You can't displace the marketplace and the price system as a test for how much society wants to value everything from productivity onward."

Michael Barone of the *Washington Post* editorial page staff added this insight: "[P]roponents of comparable worth have been talking mostly about public-sector jobs. *But look out for the hidden agenda.* No one says so out loud, and some will even deny it vehemently, but *the obvious agenda of comparable worth advocates is to bring the entire economy under their rule.* For the arguments they make apply to the private as much as the public sector. If it's wrong for the State of Washington to pay a secretary less than a truck driver, then how can it be right for Weyerhaeuser across the street (or Yale University across the country) to do so?" *(Washington Post,* Dec. 3, 1984, emphasis added.)

The careful and objective analysis given to the issues underlying comparable worth theory by this report strongly suggests that the concerns expressed have great merit to them, and that the only appropriate remedy for sex-based wage discrimination is the vigorous enforcement of the Equal Pay Act and Title VII of the Civil Rights Act.

I, therefore, concur in the findings of the Commission's report on comparable worth and join in its recommendations. These recommendations include that Congress not adopt legislation that would establish comparable worth doctrine in the setting of wages in the Federal or private sector and, further, that Federal civil rights agencies, including the Equal Employment Opportunity Commission, reject comparable worth and rely instead on the principle of equal pay for equal work.

Concurring Statement of Vice Chairman Morris B. Abram

There is sex-based discrimination in America, but it is declining.

The repetitious charge that women earn only 60 percent of what men earn in this country obscures the significant fact that women work less hours, have less seniority, and work more intermittently.

During the Commission's full and balanced consultation on comparable worth, June 6 and 7, 1984, former Secretary of Labor Ray Marshall, a proponent of comparable worth, would not support the idea of this huge and allegedly pervasive gap.

Two of the prominent economists who testified at the consultation were Dr. June O'Neill of the Urban Institute and former Secretary of Labor Ray Marshall. Neither was able to offer any evidence supporting existence of the alleged, across-the-board 40 percent wage gap. This became clear during my questioning of these two witnesses.

VICE CHAIRMAN ABRAM: I thought [what] I heard you say Dr. O'Neill, is that the 60 percent gap becomes a 72 percent gap when you reduce the comparisons to hourly wages rather than gross income.

DR. O'NEILL: That's correct.

VICE CHAIRMAN ABRAM: Then I heard you say that when you factor in and compare comparables, that is, age brackets of 25 to 35, you say it was reduced to 80 percent or came up to 80 percent or 89 percent?

DR. O'NEILL: It's 89 percent for 20- to 24-year-olds.

VICE CHAIRMAN ABRAM: Now, that leaves only a 11 percent gap. Let me ask you this, Secretary Marshall. Couldn't you explain that 11 percent gap that we have now discovered to be the gap on an hourly basis between women who are fairly modern women and men who are fairly modern men? Couldn't you explain that 11 percent gap on such factors as, or at least part of it, as mobility? Couldn't it be explained on cultural differences?

DR. MARSHALL: Unless you found some way to control. . .

VICE CHAIRMAN ABRAM: This huge thing that we've been talking about for days, the 40 percent gap, these papers have been full of it.

DR. MARSHALL: Well, mine is not full of that.

The consultation also uncovered that men and women who have never married exhibit an earnings differential of only 2.4 percent—suggesting that cultural factors for which no employer is responsible still play an enormous role in explaining pay differentials.

Thus, the dimension of the alleged problem is, overall, far smaller than supporters of comparable worth are willing to admit.

Secondly, I believe that there is something fundamentally wrong with imposing any remedy—comparable worth or any other remedy—on employers who are not, individually or collectively, guilty of engaging in sexually discriminatory conduct. When an employer sets wage levels in his or her firm according to market wage rates, there is not, and by definition, cannot be, an act of sex-based wage discrimination. It is merely the free and fair operation of a market-based economic system.

No one is suggesting that an employer be permitted to pay a female accountant less than a male accountant performing the same work. Indeed, the law forbids this and we strongly support the vigorous enforcement of the Equal Pay Act. All we are saying, and all that this report recommends, is that the government must not be allowed to force an employer to pay a female bookkeeper the same wages that are paid to a male electrician, or a babysitter the same as a plumber.

In a free society, these decisions must be left to individual citizens. We cannot turn over to the government our economic freedoms, without shortly thereafter surrendering our political freedoms as well.

Concurring Statement of Commissioner Robert A. Destro

I concur in the statement of the Commission, and in its findings and recommendations. I write separately in order to highlight two points that are often overlooked in the debate over whether the wage structure of the labor market is "fair" to working women.

Discrimination against women in the workplace is an undeniable and unpleasant reality. All the witnesses who testified at the consultation were willing to concede that some part of the "wage gap" may be attributable to discrimination, but no one is able to pinpoint either the amount of the gap attributable to discrimination or the individual(s) who should be held responsible for it. There is simply a "gap" of variable size that no one is able to explain.

In the normal case, one would expect that the matter would simply be debated until someone was able to pinpoint the illegal conduct. But not here. Advocates of comparable worth ask us—in the name of "fairness"—to assume that the entire unexplained gap is due to discrimination, and urge that the obligation to "remedy" the gap be imposed on employers, regardless of fault, in the name of "pay equity." Were the suggestion that comparable worth plans be adopted voluntarily by employers, or that pay equity be bargained for collectively as in the recent strike at Yale University, it would be an acceptable, but by no means perfect, method of redressing perceived wage imbalances in a given work force. But where, as here, it is suggested that it may be imposed on an unwilling employer and work force, comparable worth is neither equitable nor "fair" to anyone, including its intended beneficiaries.

The reason is simple, but is often obscured by the legal technicalities of a Title VII case. Simply stated, the law requires that parties are to be held liable only for their own acts, not the sins of society or the marketplace. Where an employment practice has a disproportionate impact on workers protected by Title VII, the employer is presumed to have the ability to defend against the charge that discrimination is the source of the imbalance. Thus, the law already provides an effective remedy for plaintiffs who can prove a case of sex-based wage discrimination.

This is not the case, however, with comparable worth. *No one* is able to tell us with any degree of certainty what part of the pay gap is attributable to discrimination, or who is responsible for it. To impose an impossible burden of proof on employers is neither "fairness" nor justice. The civil rights laws should not be used for such a purpose. The wage gap is an unfortunate economic reality, but the solution is not in the civil rights laws; it lies elsewhere. The Commission is correct when it urges Congress to reject comparable worth as a viable theory for proving sex discrimination.

Even more important, in my judgment, is the fact that comparable worth imposed by government has the potential to destroy the collective-bargaining rights of millions of American workers. This aspect of comparable worth has not been given anywhere near the attention it deserves. Like seniority, which we addressed in our statement on *Firefighters* v. *Stotts*, the right to bargain collectively is essential to the protection of all employees. Any theory that threatens to supplant such an important part of the protection afforded to all workers in the name of "civil rights" should be scrutinized with great care.

The object of comparable worth is to provide a seemingly "objective" evaluation of the worth, and hence the pay, of thousands of jobs across the work force. All the witnesses conceded, however, that the process is inherently subjective and is unquestionably affected by the biases of those who serve on the committee that makes the comparisons. The labor laws do not envision wages set by a committee of "experts." The words of section 8(d) of the National Labor Relations Act are instructive:

> [T]o bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment. . .but such obligation does not compel either party to agree to a proposal or require the making of a concession. . . .

Unless a subject of collective bargaining, comparable worth takes the power to bargain over wage rates and differentials away from workers. Given its inherent subjectivity, great care should be taken before such a major change in the rights of all workers is contemplated.

Dissenting Statement of Commissioners Mary Frances Berry and Blandina Cardenas Ramirez

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We do not believe the Commission has conducted sufficient factfinding to draw any conclusions about pay equity or comparable worth. The Commission has had only the benefit of limited expert testimony in a consultation and has not conducted field investigations to determine whether the experts' views accord with reality, or held public hearings in which interested persons could be given a chance to be heard under the Commission's statutory mandate.

However, because our colleagues insist on issuing findings and recommendations based on the weak reed of the consultation, we dissent and share our preliminary views while recognizing the need for additional information on the subject.

We believe that discrimination in wages and salaries should be treated in the same manner as other types of employment discrimination proscribed under Title VII of the Civil Rights Act of 1964. Public policymakers should evaluate such claims on a case by case basis. Where an employer intentionally uses unequal pay scales for jobs that require equal skills, effort, and responsibility, that employer has violated Title VII and a remedy should be imposed.

The theories of liability developed under Title VII are directly applicable to pay equity claims. For example, if in a given case any part of the wage gap is caused by the employer's reliance on historic or current job segregation, then the employer should be held accountable for a remedy. We note that the experts at the consultation could not agree on whether any part of the wage gap is caused by discrimination on the basis of sex.

Much was heard at the consultation about difficulties in using job evaluations. Whatever difficulties exist, if an employer routinely uses job evaluation to determine the level of skill, responsibility, and effort required for a job and sets wages based on these evaluations, there is no reason not to use such evaluations as evidence in a comparable worth or pay equity case. Such job evaluations have been used for approximately 20 years in cases brought under the Equal Pay Act.

As far as market is concerned, we recognize that wage setting cannot be divorced from the forces of labor supply and demand. But we also know that a history of segregation in which certain jobs were open or closed on the basis of race or sex is the setting in which labor supply and demand have operated. Although a pay disparity may not be proof of illegal discrimination, it is evidence that can be weighed along with other factors by decisionmakers in the courts and administrative agencies.

Some opponents of pay equity or comparable worth agree that women have been historically "ghettoized" in jobs, but insist that in time the pay gap will close because more and more women are entering less traditional, higher paying fields. This suggestion does not provide a conclusive answer for persons who are already working in lower paying jobs. They may have chosen the job depending on what was open to them, but they did not choose to earn lower pay. Moreover, just because women may choose to continue to work in certain jobs, there is no justification for women to continue to suffer a loss in earnings in these jobs as a result of pay discrimination.

In plain language, job titles often do not define what people do. At the root of some of the opposition to the development of pay discrimination law is the view that married male breadwinners are entitled to higher wages than either single men or women on the ground that, "You have to give some kind of respect to traditional family values."

Eliminating invidious discrimination in wages and salaries is of crucial importance to American families—to many female heads of households and their male and female children and to families in which both parents must work in order to make ends meet. We also believe that ensuring fairness in pay scales should be central to any employer's interest in employee morale and productivity.

If an employer determines that he or she has engaged in wage setting based on the sex or race of job occupants, he or she should be commended for taking steps to end the discriminatory practices. Civil rights enforcement agencies and the Congress should ensure that employers, including the Federal Government, do not use historic job segregation as a rationale for perpetuating disparate treatment in pay in their work forces. Comparable worth or pay equity, like any other concept, should be applied prudently with a full recognition of any limitations that might exist. But its use can be an important tool in the arsenal for attacking employment discrimination.

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